A

PRACTICAL TREATISE

ON THE

SETTLING OF EVIDENCE

FOR

TRIALS AT NISI PRIUS;

AND ON THE

Preparing and Arranging the Necessary Proofs.

SECOND EDITION,

WITH VERY CONSIDERABLE ADDITIONS AND CORRECTIONS.

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PREFACE.

TO THE

SECOND EDITION.

WHEN the Second Edition of a literary Work is called for, the Author draws from it the gratifying conclusion, that the first possessed some degree of merit in the eyes of those for whom it was intended. The only merit which I presumed to claim for this Publication, was, extensive utility, to a considerable class of the Profession. I affected not to treat it as a Book of legal research and learning: but as intended for practice only. A Work not of compilation; but one in which I had embodied and reduced into form, the fruits of the observation and acquired knowledge of very many years in that particular part of the Law to

which my whole professional life had been devoted; and in which, without assumption, I might say, "*me non mediocriter esse versatum*."*

There is no Court whose Proceedings are not governed by some certain Rules of practice, which are not recorded in any Roll, nor transcribed into any Book; they are the *Lex non scripta*, in the administration of Justice in the particular Court. Rules first suggested by convenience: adopted from their utility: and, from Custom, making part of the Constitution of the Court itself. A knowledge of these is acquired by practice only; and knowing how essentially necessary they are, in their application to the general settling of Evidence, I have never lost sight of them in the following pages. Who in practice, at the Nisi Prius Bar, has not seen a Party deprived of an important piece of Evidence, from the neglect of the Attorney to give notice to produce papers? Who has not seen a Nonsuit for a variance; for which a Judge's order to amend could have been had for asking for?

* Cic. pro Arch. 1.

When I, therefore, first gave this Publication to the world, I contemplated but restricted limits to its circulation; among those only to whom my first Preface addressed it. But the Profession rated its pretensions much more highly than I did myself. I found its utility acknowledged from a quarter which I had never thought of; and by those to whom I had not the vanity to think it could afford information; from members of my own Profession, and from Special Pleaders; that, by drawing their attention to the most important heads of General Evidence, they could more easily see what was wanting in the particular case before them: by those who were of less experience at the Bar, or who were preparing for it, its utility in pointing out the method of putting elementary legal knowledge into practice was most explicitly avowed. These communications were made to me in terms equally flattering as kind. But it would be uncandid, to retail my praise, and to withhold my censure. I candidly avow, that I was blamed, for not *giving the authorities for my positions*. I felt the justice of it, for they could derive no authority from being found in a Book written

by me ; in addition to which it could not fail to present itself to me ; that when used as a Book of reference, by giving the name of the Reporter, the original case might be turned to, and the corroborating or conflicting authorities be there found and considered.

To give an addition of character to a Book which I had written: to add to its utility, and increase its correctness: became an object of serious attention to me. My retirement from the active business of the Bar; and confining myself as I do, to business only which can be done in Chambers, the answering of Cases, the advising on them, and settling the Evidence for Trials ; left me a large portion of unoccupied time since that event took place ; and which I have unsparingly devoted to the improvement of this Publication. There were also in the First Edition numerous typographic errors ; and some heads of *Nisi Prius* had escaped my observation, and of course made no part of it. I would instance Actions at the suit of Attornies for their Bills, and the Action of Trespass for the Mesne Profits, and some others of equal importance.

Not only, therefore, what was erroneous, but what was wanting in the First Edition, I have endeavoured to remedy in this. The Names of Cases are all given, a task attended with incalculable trouble. I have added a considerable number of new Heads of the Law: and when I have found a sentence obscure, I have altered its language; and its structure, where it could contribute to its greater precision or clearness. Where any alteration in the Law has taken place by any recent decisions, I have accurately noted it. By these means, the Work as now given to the World, is rather a new Book, than a Second Edition of the old. More than one third of it is wholly new Matter.

I have the sanction of custom and example to authorize me in making an acknowledgment for any assistance I may have received in the course of the publication. My learned Friends Mr. Tidd and Mr. Chitty have done so to their Pupils; and I think I am bound not to withhold mine, though it is to my Son. Anxious to add to the correctness of this Edition, and at the same time render it a means of improvement in his Profession as a Special Pleader, of

which the duty of settling Evidence constitutes not the least important part, I imposed on him the task, of the careful perusal of every sheet, after I had corrected the Proofs as they came from the Press. This was willingly undertaken, and scrupulously performed: every sheet has been perused by him: every reference collated: and to his accuracy I have been indebted for many corrections.

I now leave the Book in the hands of those, whose judgments are well able to appreciate its merits, if it possesses any. If I have added one useful Book to the Profession, it will not withhold from me its praise.

April 23d., 1825.

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Page 548, Index, under Head Warehouse; *for* "Lessee" *read* Losses.

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Page 65. line 10. for "on agreement" read *on an agreement.*
— 98 —— 8, for "c. 4." read *c.* 3.
99 — — 23 dele *and*
— —— 24, for "he" re: 1 *the Defendant.*
——10' or "55" read 83.
——1 — 1, for Plaintiff" read *Defendant.*
—— 1 —15, for 22 Geo. 3." read 2 *Geo.* 3.
— —171 5, for "and' read *of.*
——192 —20, after "verifying" read *it.*
—260 —— 1, for ' laid in the Declaration" read *proved by the Defendant.*
——321 last line, dele *not*, and for 'for' read *as.*
——334 ——22, for "officer" read *Commissioners.*

A

PRACTICAL TREATISE

ON THE

SETTLING OF EVIDENCE

FOR

TRIALS AT NISI PRIUS.

CHAPTER I.

IN settling the Evidence for Trials of Actions at Nisi Prius, the principles on which it is founded are first to be considered: for that purpose the first point to be looked at is the Issue, as joined in the Cause, and the affirmative or negative averments which it contains. Affirmative averments are those only required to be proved. Issue may be joined in any stage of the proceedings; on the Plea, Replication, Rejoinder, or any other part of the pleading: and an Issue is joined, when the last pleading denies all, or part of the facts pleaded in the preceding one; whereby the case is reduced to a direct affirmation or negation.

The general Issue puts the whole of the Declaration in evidence; and when issue is joined on it, it makes it necessary for the Plaintiff to prove every material fact averred in the Declaration. But if the Defendant pleads, not the General Issue, but a Special Plea, consisting of one or several facts, and the Replication takes Issue on it, it is either on the whole of the Plea, or on some particular fact or facts averred in it. When that is done, if the Replication takes issue upon all the facts in the Defendant's Plea, it puts the Defendant upon proof of the whole of the Plea, and of all the facts contained in it. If the Replication denies any particular fact mentioned in the Plea, Issue is joined on that, and the evidence is confined to that fact only.

For example:—If the Plaintiff declares that the Defendant is indebted to him on his promissory note, and the Defendant pleads the General Issue *non-assumpsit,* on which Issue is joined; the Plaintiff proves his Issue by proving the Defendant's handwriting to the note, as that proves the averment in the Declaration, "that the Defendant did undertake to pay it," on which the Issue is joined. If the Defendant pleads, that when the note became due, "he tendered and offered to pay the amount," and the Replication denies the Tender, and Issue is joined on it; which is, by the Plaintiff saying in his Replication, "that the Defendant did not tender the money, or any part of it:" in that case the Defendant, by not denying in his plea that he had made the note, admits it, and rests his defence on his having made the Tender. It is an affirmative averment on his

part that he did so, and the whole evidence lies on him. But, if to the Tender the Plaintiff had replied, "A subsequent demand of payment of the note, made on the Defendant, and a refusal by him to pay," on which Issue was joined; in that case the Plaintiff admits the Tender, and the Defendant is not called upon to prove it; but the whole evidence rests on the Plaintiff to prove the subsequent demand and refusal, which is the Issue in the case.

This will exemplify all parallel cases, and it will be seen how to regulate the evidence by attending to the Issue; for, where there is no General Issue pleaded, the Defendant admits that the Plaintiff had a cause of action, and rests his defence, not on a denial that the Plaintiff had some cause of action, but on this; that he, the Defendant, has defeated it by some collateral matter. As if the Plaintiff declared in Assumpsit, on a debt due to him by the Defendant, and the Defendant pleads the Statute of Limitations only, "that he did not undertake or promise within six years." He thereby admits that he did owe the debt at one time; but that it is extinct by the Plaintiff having suffered six years to elapse, leaving it unsued for. So, if the Defendant was to plead Accord and Satisfaction only, "That he delivered a horse, *e. g.* to the Plaintiff, which he had accepted in discharge of his debt; if the Plaintiff takes Issue on, and denies the acceptance or delivery of such thing, in satisfaction of his demand: the Defendant admits that the Plaintiff had once a cause of action, but he discharges it by such collateral matter, the delivery of something to him, which he has accepted

in lieu of his debt. He is, therefore, bound to prove what he affirms; the delivery and acceptance, on the terms he has stated.

It rarely, however, happens that the Defendant rests solely on such Pleas, but pleads the General Issue also, except in the case of a Tender; in which case the plea of the General Issue puts the Plaintiff upon proof of his cause of action, as stated in the Declaration.

When, therefore, the Issue is joined on the whole Declaration, by a plea of the General Issue, the Declaration must be taken up as consisting of so many parts as there are averments in it; and each must be proved in its order.

Thus, for example,—by reference to a Declaration in an Action for an Escape, which will be found at length in Chitty on Pleading, Vol. II. p. 185, 3d Edit. the following averments will be found:—

The first averment is, "That the plaintiff had recovered a Judgment against one E. F., for a certain sum:" that must be proved.

The next averment is, "That the Plaintiff sued out a writ of *ca. sa.*, directed to the Sheriff of ——; and that it was delivered to the Sheriff to be executed:" this must be proved.

The next averment is, "That the Sheriff, by virtue of that writ, arrested E. F.:" the fact of the arrest must be proved.

The last is, "That the Sheriff permitted him to escape:" that must also be proved, by giving evidence of E. F. having been seen at large after he had been arrested, as before.

What is thus required to be proved, I have put in general terms: the mode of proving each of these averments will be given in its proper place, *post.*

But though it is stated generally that all affirmative averments are necessary to be proved, and though the Plaintiff and Defendant are equally bound to prove such averments in their respective Pleadings, there are some, though of that description, which are deemed immaterial: that is, which do not affect the grounds of the Action or Defence, and which for that reason need not be proved.

Thus, the *day* laid in the Declaration is, in all cases, immaterial; except in the action of Ejectment; on Penal Statutes; or where it makes part of the contract on which the Action is brought: such as in Actions on bonds, or written instruments, as bills of exchange, notes, or the like; for in these, the date identifies the contract, and makes part of it. Thus, a Declaration on a Bond, dated on the 1st of January, and so described in the declaration, would not be proved by the production of a Bond dated on the 10th, for they would appear to be different Instruments. But, if the Declaration stated a contract for the sale of goods, as made on the 1st of January, and unpaid for; and the evidence was that the contract was made on the 10th; as the time of making the contract is of

no importance; the Action being founded on the breach of promise, in not paying for them, the averment of the particular day on which the Contract was made is considered immaterial. In those latter cases, therefore, it is sufficient for the Plaintiff to prove his cause of action to have accrued on any day before the commencement of the Action, though it differ from that laid in the Declaration.

The *place* is also, in transitory actions, immaterial; for the legal principle is, that *Actio personalis sequitur personam*. Debt is a debt everywhere, and there is no locality belonging to it; but an Action that concerns the land is local: therefore, in Trespass *quare clausum fregit*, or in Ejectment, if the Declaration lays the fact committed, or the description of the premises, in a wrong county or parish, it is fatal. In these cases, therefore, the proper description of the place should be attended to, as laid in the Declaration, and the Plaintiff be prepared with Evidence to prove it, if it is doubtful or likely to be disputed. (*a*)

The same attention should be paid on the part of the Defendant; for wherever the place is material, and is improperly laid in the Declaration, he can avail himself of the misdescription; for which purpose the Defendant should be prepared to prove the true place, and the Plaintiff would then be nonsuited. Therefore, when this occurs, it will be prudent in advising on the evidence in any action, to look to the

(*a*) Cases of action against constables or officers is an exception to this: but those actions are made local by statute 21 Jac. I. ch. 12. s. 2.

title Venue in the books of Abridgment or Practice; and, if the Venue is improperly laid, the Defendant, by disproving it, entitles himself to a nonsuit.

As, for example: where the statutes 31 Eliz. chap. 5. sect. 2., and 21 Jac. I. chap. 4., direct that all actions on Penal Statutes, by common Informers, shall be brought in the proper County, if the Defendant gives evidence, that the offence was committed in a different County from that laid in the Declaration, the Plaintiff must be nonsuited.

Having now stated what are the principles on which Evidence is to be settled for Trials at Nisi Prius, I shall first lay down a few general Rules to be applied in practice in all cases; and, secondly, the Rules to be observed in settling the Evidence in each Action, separately.

FIRST, OF THE GENERAL RULES AS TO SETTLING EVIDENCE FOR TRIALS AT NISI PRIUS, TO BE OBSERVED IN PRACTICE.

Rule 1.—The evidence to be produced on the Trial of any Cause at Nisi Prius must correspond with the Issue in every point, and with the several averments in the Pleadings, if it does not and the Issue lies on the Plaintiff, he will be nonsuited, if on the Defendant, he will have a verdict against him: for any variance in these respects is fatal. (*b*) As if the Issue

(*b*) Vide 2 Esp. Dig. N. P. 172.

e. g. was on the warranty of a horse, stating it to be, "That he was steady in harness," and the evidence was that he was warranted "sound," that would not support the Declaration. If the action was "Assumpsit for goods sold and delivered," and the evidence proved the demand to be for "money lent," the Plaintiff would fail in his Action.

So where a Writ was set out in the Pleadings, stating it with an *ac etiam* for 50*l.*, whereas in fact it was for 30*l.*, the variance was held to be fatal, (5 Price 540.)—Wherever therefore written evidence is to be given at a Trial, the Instrument or writing should be accurately compared with the Record; and if there is found any inaccuracy, such as that last stated, the Declaration should be amended, which may be done by a Judge's order, even after the Record has been passed, as I have in practice known often done.

Rule 2.—Every written Instrument to which there is a subscribing witness, can only be given in evidence, by calling the subscribing witness to prove the execution of it: he must, therefore, in every instance, be subpœnaed. And this is not dispensed with, though the Instrument is in the hands of the opposite party, and the name of the subscribing witness unknown. In such a case, a copy must be obtained by means of a Judge's order, of the name, description, and place of abode of the subscribing witness; and he must be had if possible.

The exceptions to this Rule where the calling the subscribing witness has been dispensed with, will be found in the chapter of Debt, *post.* Chap. III.

Rule 3.—Service of all Papers in the course of a Cause, as Notices, Summonses, and the like, at the Party's or his Attorney's dwelling-house, or usual residence, is good service. Personal service is only required when an Attachment is to be grounded upon it:. but no service is good, if made on a Sunday. All Papers, however, connected with the Cause should, after appearance, be regularly served on the Attorney in the Cause; such as notices of set-off: to produce Papers or Notices, which are necessary, in order to make copies evidence: and under the Stat. 49 Geo. III. of contesting a bankruptcy: and where there is an Agent in town in a Country cause, all Notices are to be given to Him, and not sent into the Country. (c)

Rule 4.—Evidence of a party's handwriting, usually, is proved by the testimony of witnesses who have seen him write, and are acquainted with his character of writing. The witness is not called upon to swear positively, that the paper produced *is* the handwriting of the party, but only that he *believes it to be so.* But an handwriting may be proved by a witness who never saw the party write, but who has corresponded with him: (d) this evidence is however admissible only, where the correspondence has been acted under; as for example, where a person, whose handwriting is to be proved, has ordered goods which have been sent to him pursuant to his order, and he has paid for them: but comparison of hands is not allowable. (e)

(c) *Per* Buller J. in Griffiths *v.* Williams, 1 T. Rep. 711.
(d) Gould *v.* Jones, 1 Black. 384.
(e) Vide 1 Esp. Dig. N. P. 176.

Rule 5.—When any Paper, or written Instrument, is wanted to be used as evidence at the Trial at Nisi Prius, which is in the hands of a third person, it must be procured by a *subpœna duces tecum* to the party who is in possession of it, and the Paper or written Instrument required should be described in the *subpœna:* if it is in the hands of a Party in a Cause, notice must be given to him to produce it; if not produced, the Party who gave the notice may, on proof of the notice given, and that there was such Paper or written Instrument in the opposite party's possession, give evidence of it by a copy, or by parol, that is, provided it is in such Party's possession at the time; for if it is in any place where the Party who wants to use it as evidence, can have a Copy of it, as when it was filed in the Court of Chancery in the course of a Cause, and a Copy of it could have been there had, it was ruled that such secondary evidence could not be received. (*f*) But if a copy is offered in evidence, it must be proved to be a correct or examined one.

The notice should properly state, specifically, the Paper or Instrument wanted, in the same way as is required in the subpœna, and must be served on the Party who is in possession of it, and who is called on to produce it; for where the Defendant in the Action had acted under a third person, and justified under him, and the *notice to produce a certain Paper which had been delivered to that Person in the Defendant's house, was served on the Defendant, and not on that Person*, it was ruled that that service was not sufficient

(*f*) Williams *v.* Munnings, Ryan and M., N. P. C. 18.

to entitle the Plaintiff to give secondary evidence of its contents. It should have been on the party himself, his servant, or at his dwelling. (*g*)

Rule 6.—Of every thing which is matter of Record, an examined copy is evidence at Nisi Prius; as of a Judgment, a private Act of Parliament, and the like. So of Books of a public nature; and which, if produced, would be of themselves evidence, examined copies will be evidence: such as the Bank books, books of the East India Company, the Journals of the House of Commons, the Council book in the Secretary of State's office; and the like. (*h*) These Copies must be proved by a witness who examined them with the originals.

[illegible]—In many cases *Notice of Action* is required to be given, and no Action can be commenced until the expiration of the time mentioned in it. This is principally in Actions against Public Officers; as Justices of the peace, Constables, Officers of the Excise, &c. and is directed by several statutes to be done. The forms of these will be found in Tidd's Practical Forms, page 1.

Where the Statute requires such notice, the Plaintiff must, at Nisi Prius, be always prepared to prove it, and give evidence of the service of it, at the Trial. He should also have the Writ ready to produce, to shew the regular commencement of the Action; and that it was sued out after the time required by the Statute had expired.

(*g*) Evans *v.* Sweet, Ryan and M., N. P. C. 83.
(*h*) Philips on Evid. 338.

This is done, by calling the witness who served the notice on the Defendant, and by his production of a copy of it. The witness should also be prepared to prove the actual day on which he served it: this is best done by the Person who served the notice, indorsing on it the day on which he served it. Every Attorney keeps, of course, a copy of all notices which he serves: if there were two copies of such notice of Action made out by him at the same time, one of which he has had served, and the other he has kept; it will be sufficient for the witness to produce the latter at the trial of the cause; provided he had compared it with the one he had served, and swears to the service. (*i*)

It is usual, however, to give notice to the Defendant, to produce at the Trial, the notice of Action served on him, considering the copy kept as a copy merely: that however is, by the authority just cited, unnecessary. But I would advise such notice "to produce papers, letters," &c. to be given in every Action, where any part of the transaction on which the Action is founded, has taken place through the medium of writing or correspondence.

Rule 8.—Every Instrument which requires a stamp should be carefully compared with the Table of Stamps before the Trial, to see that it is properly stamped; and, if it is not, to get it stamped at the Stamp office, as otherwise it cannot be given in Evidence. And as to what are the proper stamps, the Rules are these—

(*i*) Jory *v.* Orchard, 2 Bos. and Pull. 39.

1. Every Instrument ought regularly to have the Stamp appropriated by the Stamp Acts to such Instrument, and of the value required by the statute. But, by stat. 43 Geo. III. c. 127. if the stamp is of the proper denomination, but of an higher amount than the Instrument produced required, it may be given in evidence. And this has been carried still further, by stat. 55 Geo. III. c. 184. s. 10. which enacts, "That, even though the denomination is wrong, yet, if the stamp is of equal or greater value than could be required for the Instrument offered in evidence, it will be effectual; except in cases where the stamp used on such instrument is specially appropriated to any other instrument, *by having its name on the face of it*, of which there are many; as for Agreements and Awards, which have those words standing in the body of the stamp, and therefore are admissible in no other cases.

If, therefore, the Instrument which is to be given in evidence is stamped with a stamp not having any such name on it, it is necessary now only to look, that it is of sufficient value or amount.

2. But, though an Instrument may have a wrong stamp, or when produced is found to have none, it yet may be admitted in evidence for collateral purposes: such as for a witness, to refresh his memory by it, for which purpose he may refer to an unstamped receipt. (*k*) So, if there are two parts of

(*k*) Jacob *v.* Lindsay, 1 East. 460. Rambert *v.* Cohen, 4 Esp. N. P. C. 213.

an agreement, one stamped, which is in the possession of the Plaintiff, and an unstamped one in the possession of the Defendant, and the Plaintiff has had notice to produce his part, which is stamped, and he does not, the unstamped agreement may be given in evidence for the Defendant: (*l*) but that in the Defendant's possession must be proved to be a Copy of that in the Plaintiff's.

If however the agreement required a stamp, but had never been stamped, and has been destroyed; though in general cases, where an Instrument has been lost or destroyed, a Copy or parol evidence may be given of its contents, in this case it cannot; for the original requiring a stamp in order to be received in evidence, and never having been stamped, it never could be received as evidence, therefore a copy is inadmissible: when a Copy or proof by parol is under such circumstances proposed to be given in evidence, the Party must be prepared to shew that the original had been stamped. (*m*)

3. Where there are many Parties to a Deed, if they all have a claim upon the same fund, which is the object of the Deed, a single stamp is only required, though each claim a separate part; as, *ex. gr.* a composition Deed with creditors. But, where each claims under a distinct right, something out of one

(*l*) Garnons *v.* Swift, 1 Taunt. 507. Waller *v.* Horsfall, 1 Camp. 501.

(*m*) Rippiner *v.* Wright, 2 Barn. and Ald. 478.

common fund or subject, there there must be distinct stamps for each. (*n*)

Rule 9.—The Rules now laid down apply to *written Evidence:* but as *vivâ voce* Evidence generally constitutes the principal part of the Proof of every Case at Nisi Prius, it must be particularly attended to, to see that the witnesses who are to be called, are admissible in point of law. These Rules are therefore to be observed:—

1. *Any Person having an interest in the event of the cause* cannot be a witness, that is, if he is to derive any advantage from the Verdict; but it must be a direct and certain interest. The distinctions as to what interest disqualifies a witness on this head are very numerous. (*o*) In settling the Proofs before a witness is set down to prove a Case, reference should be had to those cases in the Books referred to below: if the witness has any connection with the cause, it does not disqualify him, if he has no interest in the event of it.

2. *Counsel and Attornies* cannot be called as witnesses to prove any fact which they have come to the knowledge of by their Professional situation, as communicated by their Clients, nor to produce papers so intrusted to them by them: but facts which have come to their knowledge, by other means, they are

(*n*) Davis *v.* Williams, 13 East. 232. Goodson *v.* Forbes, 6 Taunt. 171.

(*o*) Vid. 2 Esp. Dig. N. P. 206. Phillips on Evidence.

bound to give evidence of. (*p*) And it must be confined to communications connected with the cause, as such only they can refuse to disclose. (*q*)

3. *Husband and wife* cannot be witnesses for or against each other. But no other relationship, such as sons or brothers, *e. g.* excludes persons from being witnesses for each other. But the admission by the wife of a debt contracted in the husband's business which was conducted by her, has been held to be admissible Evidence in an Action against him. (*r*)

4. *Persons who are infamous on account of a Conviction at Law for Crimes,* such as treason, felony, perjury, forgery, or conspiracy,' are inadmissible as witnesses: but a pardon may restore such a witness to competence. (*s*)

5. *So persons infamous on account of their Religious principles* are inadmissible. Such as Infidels or disbelievers in the Gospel of God, though they profess to be Christians: but Persons of other religions, as Jews or Mahometans, may be good witnesses, if sworn according to the Ceremonies of their own Religion. (*t*)

As also may a Christian swear on the Old Testament, if he considers it binding on his conscience. (*u*)

(*p*) 2 Esp. Dig. N. P. 220.
(*q*) Williams *v.* Mundie, Ryan and M. 34. 1 Phillips 131
(*r*) Clifford *v.* Burton, 1 Bing. 200.
(*s*) 2 Esp. Dig. N. P. 228.
(*t*) *Id. ib.* 229.
(*u*) Edmonds *v.* Rowe, Ryan and M. 77.

6. *Persons insane, Idiots, or labouring under a defect of mind and understanding,* are not witnesses. Neither are Children at an early age: but if they shew a perfect understanding of the nature of an oath, and intelligent minds, their Evidence is admissible.

If the case can be proved by such witnesses only, it cannot be supported.

7. *The admissions of a Party in the Cause,* as to any matter connected with it, are Evidence; and generally, the particulars of the fact admitted, are proved either by witnesses who have heard the Party make such admissions, or by some letter or paper in his handwriting, which should be proved. But it must be taken with this exception; that if what the Party is stated to have admitted, is capable of better proof, and is not an admission of a naked fact, but involving some matter of law; the merely proving what the Party said, will not be sufficient: as where it was proved that the Plaintiff has said, "that he had taken the benefit of the Insolvent Act, subsequent to the time, when the cause of Action then trying, accrued." This bare declaration was held not to be sufficient to conclude the Plaintiff, for it involved some question of law, and the fact of his having taken the benefit of the Act, could have been established by unequivocal Evidence from the Rolls of the Insolvent Court. (*x*)

8. In settling Evidence, *hearsay* must not be ad-

(*x*) Summersett *v.* Adamson, 1 Bingh. 73.

mitted among the Proofs, except in the cases of Prescription, (*y*) on the Issue of parcel or not parcel, (*z*) or of pedigree. And the hearsay in the last Case, is confined to what *Persons of the family* have been heard to say. (*a*)

These are the general Rules applying to all cases of Settling the Evidence for Trials at Nisi Prius, and I shall now proceed to consider, separately and distinctly, the Evidence necessary in every Action so tried there.

(*y*) Skinner *v.* Lord Bellamont, Bull. N. P. 295.
(*z*) Davis *v.* Pearce, 2 T. Rep. 53.
(*a*) Vid. post. Ch. Ejectment.

CHAPTER II.

OF SETTLING THE EVIDENCE IN THE ACTION OF ASSUMPSIT.

IN treating on this subject, as it applies to this Action, I shall first point out the Evidence which is required to support the Action in the different Cases of it tried at Nisi Prius, that is, the evidence on the part of the Plaintiff; and, 2ndly, That of which the Defendant may avail himself in answer. These rank chiefly under the following heads, on the part of the Plaintiff:—

I.—In the case of express contracts in writing.

II.—In the case of express contracts, which may be made either verbally or in writing.

III.—In the cases, as far as they respect the persons of the contending parties, and the relation in which they stand to others.

I shall lastly consider the Evidence on the part of the Defendant.

Of express contracts in writing; the most important are—1. Bills of Exchange and Promissory Notes. —2. Policies of Insurance.

I.—*Of settling the Evidence in Actions on Bills of Exchange and Promissory Notes, and what it is necessary for the Plaintiff to prove.*

I.—The Plaintiff must produce at the Trial, the Bill of exchange, or the Promissory Note itself declared upon. Evidence that the Bill or Note declared on has been lost or cannot be found, will not entitle the Plaintiff to give a copy in evidence; to make a copy admissible in evidence, it must be proved to have been *destroyed;* and unless the actual destruction of the Bill or Note is proved, the Plaintiff cannot recover by the production of a copy of it, or at all, (*a*) for if mislaid or lost only, and the Plaintiff recovered on a copy, if it was afterwards found and put into circulation, the party might be twice charged.(*b*)

Wherever, therefore, the Plaintiff offers a copy in evidence; to entitle him to recover, he must call a witness to prove that the Bill or Note declared on and not produced, was subscribed or drawn in the Defendant's hand-writing: that what is offered in evidence, is an accurate copy or transcript of it, by having compared it with the original; and, lastly, to prove the actual destruction of it.

(*a*) Mayor *v.* Johnston, 3 Campb. 324. Davis *v.* Dodd, 4 Taunt. 602. 1 Esp. Dig. N. P. 176.

(*b*) Mayor *v.* Johnson, 3 Campb. 324.

II.—The Plaintiff was never called upon to prove the consideration he gave for the Bill, or his title to it; unless the consideration, or his title to it, was first impeached by evidence produced by the Defendant. (*d*) The bare production of the Bill was, therefore, *primâ facie* evidence of title in the Plaintiff.

This was the rule at all times in practice; and is still, as I am informed, that which is adopted by Lord Ch. J. Abbot. A different rule was, however, laid down by Lord Ellenborough, (*e*) which was, that wherever the Defendant gave notice to the Plaintiff, that the want of consideration would be insisted on, as matter of defence; the Plaintiff should not be allowed to go into evidence of the consideration in answer to the Defendant's case:—of course, that he should go into evidence of the consideration in the first instance; and that Rule, Best Ch. J. said he should adopt in the Common Pleas. It will, therefore, (let the rule be what it will) when the Defendant gives such notice, be requisite, at least prudent, for the Plaintiff, to be prepared with evidence of the consideration, which must be a legal one. (*f*)

The Evidence which always entitled the Defendant to call on the Plaintiff to prove the consideration given, or his title to the Bill, was, *e. g.* that he had been swindled out of it: that it was given for an illegal consideration: or, that it had been stolen from him, or lost. Some of these circumstances he was

(*d*) 1 Esp. Dig. N. P. 178. Patterson *v.* Hardacre, 4 Taunt. 115.
(*e*) Delauney *v.* Michell, 1 Starkie, 439.
(*f*) Spooner *v.* Gardiner, Ryan & M. 84.

bound to prove: but these circumstances, though not sufficient to prevent the Plaintiff from recovering the amount of the Bill or Note, if he was a *bonâ fide* holder of it, and not implicated in any fraud or illegality connected with it, yet, from the suspicion and doubt which they raised as to the negotiation of the Bill, they were held to be sufficient to call on the Plaintiff to prove the consideration which he gave, or how he became possessed of it. (*g*)

But even where no notice has been given by the Defendant to that effect, wherever it is expected that the Defendant means to bring forward any such evidence, the Plaintiff must not content himself with proof of the hand-writing only, but be prepared to shew how he became possessed of the Bill, and the consideration which he gave for it: if he came fairly by the Bill, and gave for it a full and valuable consideration, though the bill might have been lost by the Defendant, or stolen from him and put into circulation, it will not affect the Plaintiff's right to recover. (*h*)

The old Rule on the subject was, that in the King's Bench the Defendant might bring forward this Evidence at the Trial: in the Common Pleas, the Court made a Rule, that the Defendant must give notice of his intention to do so, or it could not be received.

III.—The Plaintiff being the holder of the Bill, or

(*g*) Patterson *v.* Hardacre, 4 Taunt. 115.

(*h*) Miller *v.* Race, 1 Burr. 452. Grant *v.* Vaughan, 3 Burr. 1516. Peacock *v.* Rhodes, Dougl. 613. Sir J. Lawson *v.* Weston, 4 Esp. N. P. C. 56.

Note, is either the Payee or the Indorsee ; and the Evidence required when the Action is against different parties on the Bill is as follows :—

1. If *the Action is by the Payee against the Acceptor* of a Bill of Exchange, or the maker of a Promissory Note, the Plaintiff is required only to prove the hand-writing of the Defendant ; and there is no necessity to prove a previous demand of payment on him ; nor, where the action is on a Bill of Exchange, to prove the drawer's hand-writing.

2. If *the Action is by the Payee against the Drawer* of a Bill of Exchange : if *the Bill was accepted,* the Plaintiff must prove the Acceptor's hand-writing to it, or otherwise identify him as the Acceptor ; a demand of payment of it from him when due ; that he did not pay it, and notice of his neglect or refusal given to the Defendant ; and then prove the Defendant's hand-writing as drawer of the Bill, which is sufficient. The evidence of due notice given to the Drawer of the Acceptor's default, is indispensable, unless under particular circumstances after-mentioned, for which see *post,* p. 32. ; for the Drawer becomes liable only on the Acceptor's default. This Rule as to notice, must be strictly attended to, in all cases where Notice is required, and must be given in due time after the Bill has been dishonoured ; any omission of it, or laches in giving it, defeats the holder's right of Action.

If the *Bill was refused acceptance,* the Plaintiff must prove, that the Bill was tendered for acceptance

to the drawee as described in the Bill, and his refusal to accept; and then prôve notice of his refusal given to the Defendant, whose hand-writing must be proved.

3. If the Action is *by the Indorsee against the Acceptor:* in case of a single indorsement, which must be by the payee, the Plaintiff must prove the Defendant's hand-writing to the acceptance, and the Indorser's handwriting on the back of the Bill, which is sufficient.

What is said here of a single Indorsement, means a general Indorsement by the Payee only, by putting his name on the back of the Bill; this is called an indorsement in blank; but if he made a special indorsement as to pay to A. B., then unless A. B. is the Plaintiff, the indorsement of A. B. to any other person must also be proved, (*h*) if the latter brings the Action as Indorsee of the Bill.

If there are several Indorsers whose indorsements are stated in the declaration, their hands-writing should all be proved. But, as it is usual, to have a second Count in the Declaration against the Acceptor, stating the first indorsement only; proof of the first Indorser's hand-writing only will be sufficient.

If the Action is by the *Indorsee of a Promissory Note against the maker,* the Plaintiff must prove the hand-writing of the Defendant, the maker of the Note, and that of the Indorser to him; who is necessarily

(*h*) See Chitty on Bills, 502, last head.

the person to whom the Note was payable. If there are more Indorsers whose names are stated in the Declaration, their hands-writing must also be proved.

IV.—If the Action is *by the Indorsee against the Drawer of an accepted Bill*: the Plaintiff must prove the handwriting of the Acceptor, or otherwise identify him as the Acceptor: of the Payee, or first Indorser; and if there are more persons set out in the Declaration as Indorsers, their respective hands-writing, and that of the Defendant. He must then prove a demand of the payment of the Bill when due, of the Acceptor, and his omission or refusal to pay it; and notice of his default duly given to the Defendant.

But, if the *Bill was not accepted*, the Plaintiff must prove the hand-writing of the Indorser, and of the Defendant; and that the Bill was presented for acceptance to the Drawee, as described in the Bill; his refusal to accept, and notice to that effect given to the Defendant.

V.—If the Action is by *the Indorsee against the Indorser* of an accepted Bill of Exchange, it has been ruled, that the Plaintiff is not called on to prove the hand-writing of the Drawer, or prior Indorsers,(*i*) but he must prove the hand-writing of the Defendant and of the Acceptor, and a demand and refusal, or omission to pay it when it became due, and due notice to that effect given to the Defendant. It appears, however, to be prudent, in all cases to be prepared

(*i*) Critchlow *v.* Parry, 2 Camp. 182.

with evidence of the hand-writing of the Payee, who is the first Indorser; such being decided to be necessary in the case of Smith *v.* Chester.(*j*)

If the Bill was not accepted, when offered for acceptance, the Plaintiff must prove, that the Bill was presented to the Drawee for acceptance as described in the Bill, which he refused or omitted to do: and due notice of that circumstance, given to the Defendant; that evidence with proof of the Defendant's hand-writing, will be sufficient.

VI.—"The Cases here put, are the common ones, of acceptance by a single person, on whom the Bill is drawn, and who subscribes his name to it in token of that acceptance: but there are other cases, in which a Party is made liable as acceptor, though the acceptance is not so made. These are cases of acceptance by procuration: by letter: by parol: by withholding or destroying the Bill: or by one Partner for another. So there are conditional acceptances, or acceptances payable at a particular time or place: in all of which cases, the proofs must be attended to."

1. *If the acceptance is by procuration, or agency;* as that is an acceptance by one man in his own name, for another who is the Drawee of the Bill and who is sued as the Acceptor, by virtue of an authority given by him to such person for that purpose; in order to bind the Principal, Evidence must be given of that

(*j*) 1 Term. Rep. 654.

authority; for that purpose the person himself by whom the acceptance was made, may be called as the witness to prove it; it is the best Evidence, and should always be had if possible. If that witness cannot be had; proof of a power of attorney given by the Defendant, to him who as agent accepted the Bill, will be good Evidence: so would the declarations or admissions of the Defendant, that he had authorized the party to accept Bills for him. And, lastly, it would be sufficient to fix the Defendant as Acceptor; to prove that the Agent was in the habit of so accepting Bills on his Principal's account, which the latter, in many instances, had paid; but in this case of an acceptance by procuration, Evidence of the authority to accept, by some mode or other, is indispensable. (*k*)

2. *If the Action is against the Defendant as Acceptor by reason of an Acceptance by letter;* the Defendant's hand-writing subscribed to the letter must be proved; and it must be clearly made out that the promise to accept, so given by letter, referred to the Bill on which the action is brought, either by its having been inclosed in the letter, or stated in it, and clearly referring to it; and the promise must be in unambiguous terms.

For when the Party by letter said, "I will accept and certainly pay the Bill," that was held to be an acceptance. (*l*) But where to a letter from the Drawer of a Bill requesting the Drawee to honour a Bill

(*k*) Johnson *v.* Mason, 1 Esp. N. P. C. 89.

(*l*) Wynne *v.* Raikes, 5 East. 514.

drawn on him, the letter in reply said "the Bill shall have attention," these words were held to be too ambiguous to amount to an acceptance. (*m*) In settling therefore this Evidence, it must be well attended to, whether what the Drawee has said in his letter, is an absolute promise to accept, or is vague and uncertain, as the former only will support the case against the Acceptor.

But no promise to accept a Bill *to be drawn,* can charge a Party as Acceptor, the promise must be made after the Bill has been drawn and is in existence; that circumstance should also be attended to. (*n*)

3. *If the Action is against the Defendant charging him as Acceptor on an Acceptance by parol;* that must be proved by a witness who heard the Defendant say, that he had accepted the Bill: and the same attention must be paid to the identifying the Bill with the parol acceptance; such as, *e. g.* if the witness had the Bill in his hand, at the time when the Defendant said he would accept it, or had accepted it.

The two preceding cases of acceptance by letter or parol, and the evidence necessary to support them, now apply only to foreign Bills of Exchange, it being enacted by stat. 1 & 2 Geo. 4. ch. 78. "That no acceptance of any inland Bill of Exchange shall be sufficient to charge any person, unless the acceptance be in *writing on the Bill;* or if there be more than

(*m*) Rees *v.* Warwick, 2 Barn. & Ald. 113.

(*n*) Smith *v.* Brown, 2 Marsh, 41. Johnson *v.* Collings, 1 East, 98.

one part of the Bill, on one of the parts;" no person can be therefore now charged as the acceptor of an inland Bill of Exchange, unless his name appears on the Bill, and then proof of his hand-writing is sufficient.

4. It has been held, that if a person on whom a Bill is drawn, and presented for acceptance; in place of returning it, either immediately, or if demanded, within due time after it has been left for acceptance, *withholds it for a length of time, or destroys or defaces it;* that he should be chargeable as the Acceptor of it. (*o*) In such case the Plaintiff should give the Defendant notice to produce it, if not destroyed, and if not produced or destroyed, he must prove a copy of the Bill which was left with the Defendant; and prove the delivery of such Bill to the Defendant at a particular time; a demand of it in due time after; and that it was not returned, was destroyed or defaced.

5. If a Bill *is accepted by, or indorsed by a Firm,* consisting of several Partners whose names at length stand as Defendants on the Record, but who are in the Declaration described and declared against as carrying on trade and business, by the name, stile, or firm of   and Co.: the Acceptance or Indorsement must necessarily be in the hand-writing of one of them; in that case the Plaintiff must prove the

(*o*) Chitty on Bills, 194, and Cas. *ibid.* Tamen quære, et vide Jeune *v.* Ward, 1 B. and A. 653. in which three Judges dissented from the opinion of Lord Ellenborough, and held it not to be an acceptance.

hand-writing of such Partner, and that he is a member of that Firm consisting of the Defendants on the Record, and further that all those names appearing as Defendants on the Record, are members of that Firm. (*p*) But if *there are several Acceptors' names* on the Bills, the Plaintiff must prove the hands-writing of each of them.

6. If the *acceptance of the Bill is conditional*, as, *e. g.* "accepted payable on the arrival of a ship," the Declaration must aver the Condition performed on which it became payable, that is, the arrival of the ship; and the Plaintiff must not only prove the Defendant's hand-writing to the bill, but he must give Evidence of the actual arrival of the ship.

So if the acceptance of a Bill is in the form below prescribed by stat. 1 & 2 Geo. 4. made "*payable at a particular place*," the Plaintiff should prove a demand of the payment of the Bill at that place; as, for example, in the common course of business *at a Banker's*: and in such case, it is incumbent on the Plaintiff to prove, not only a demand of payment at the Banking-house, but that it was made within the usual hours of business; that is, before five o'clock in the afternoon. (*q*)

But this proof is not required to be given in every case; for there having been a difference of opinion,

(*p*) Thwaites *v.* Richardson, Peake, N. P. C. 16. Chitty on Bills, 488.

(*q*) Parker *v.* Gordon, 7 East, 385, and Elford *v.* Teed, 1 M. & S. 28.

between the Courts of King's Bench and Common Pleas, as to the necessity of proving a demand at the place mentioned in the acceptance for payment, it was enacted by stat. 1 & 2 Geo. 4. ch. 78. "that an acceptance payable at a Banker's or other place shall be taken as a general acceptance; but if the acceptance is "at a Banker's or other place *only*, and *not otherwise or elsewhere*," such shall be taken to be a qualified acceptance, and the acceptor shall not be liable to pay the Bill unless it has been there demanded. Evidence therefore of the demand of payment of the Bill at the place mentioned, when there are those words in the acceptance, is indispensable, and must make part of the proofs at the Trial on the part of the plaintiff, and which is generally proved by a Notary who presented the Bill there.

7. If the Bill is *payable to bearer*, proof of the acceptor's hand-writing only is sufficient.

VII.—These are the cases which usually occur, in which the Evidence is given in Court, on the production of the Bill itself, and with reference to the names on it: there are however two cases of collateral evidence, which are of themselves sufficient proof of the plaintiff's case; and in which no further evidence is required.

1. If the *Defendant has paid money into Court* on the whole Declaration, in any one count of which the Defendant is declared against as a Party on the Bill; it is sufficient Evidence for the Plaintiff, to produce at the Trial, the Bill of Exchange, and the copy of

the Rule for the payment of the money into court. (*s*) This Copy of the Rule for paying the money into Court, is served on the Plaintiff's Attorney by the Defendants. Proof must therefore be given by the Plaintiff that the Copy produced in Evidence was that served on him in the course of the Cause, by the Defendant's Attorney; such as, that it was left at the Plaintiff's Attorney's Office by the Defendant or his Clerk.

2. If the Defendant is sued, as Acceptor of a Bill of Exchange, on which there were several indorsements, and when the Bill became due he had *asked for time for payment*, (*t*) or if, when it became so due, he had *promised payment*; (*u*) this supersedes the necessity of going into proof of the hands-writing of the parties whose names are on the bill, or of notice of its dishonour. For it admits his liability on the Bill in the state in which it was tendered to him for payment, and such as is stated in the Declaration. But the request for time, or promise to pay, must be an absolute one, and be distinctly proved, and also that it applied to the Bill of Exchange mentioned in the Declaration: of this the best Evidence is, that of a witness who applied for the payment of the Bill in question, and produced it to the Defendant, at which time he asked for time, or promised to pay it.

(*s*) Israel *v.* Benjamin, 3 Camp. 40.

(*t*) Bosanquet *v.* Anderson, 6 Esp. N. P. C. 43.

(*u*) Lundie *v.* Robinson, 7 East. 231. Hopley *v.* Dufresne, [illegible] East. 275. Dennis *v.* Morrice, 3 Esp. N. P. C. 158.

VIII.—In laying down the Rules applicable to such cases of Evidence as are before stated; *Notice of the dishonour of a Bill is always required,* where the party sued was not first liable, but becomes so, by reason of the default of the party who was so. This is the case in all Actions on Bills against the drawer or indorser, who, being only liable on the default of the acceptor, notice is required to be given of his default to them where they are Defendants, or the Plaintiff will be nonsuited. In every case therefore where the Action is against the Drawer or Indorser of a promissory note or Bill of Exchange, the Plaintiff must give Evidence of this notice as part of his Case. And on that head these matters are to be attended to in settling the Evidence.

1. The notice should be given by the holder of the Bill when it became due, and may be either verbally, or by letter. (*x*)

If the notice was verbal, it is proved either by the person who gave it by the Plaintiff's direction, or heard him give it: and the witness must be able to prove, that it applied to the Bill on which the action is brought.

If the notice was by letter, which is good notice; the Plaintiff should produce and prove a copy of the letter written by him to the Defendant, informing him of the non-acceptance or non-payment, or dishonour of the Bill; this is done by calling a

(*x*) Tindal *v.* Brown, 1 Term Rep. 167.

witness, who examined the copy produced with the original letter, and it must appear, that it was addressed to the Defendant, and directed to him at his dwelling-house, or place where he carried on business, or to his usual place of abode: therefore if his residence was known, it would not be a good notice to send it to a Coffee-house, or to a place which he only occasionally visited. This letter, the witness should be able to prove, was either put into the Post-office, delivered to the postman, or sent away in the usual mode of sending letters to the Post from the Plaintiff's house, or was personally delivered to the Defendant himself; and he should also be able to speak accurately as to the day and the time on which it was put into the Post-office, or delivered to the Defendant, which at farthest should be the next day after the Bill or Note was dishonoured; or, if by letter, by the next day's post: (*y*) if, however, the party's residence is unknown, that strictness as to the time of giving notice is dispensed with; but the Plaintiff must prove his endeavour to find it out. (*z*) But, in order to admit this Evidence of notice of the dishonour by Letter, the Defendant must be served with a notice to produce the original letter.

If, in consequence of such notice to produce, the Defendant produces the original letter, it speaks

(*y*) Per Abbott, C. J. in Williams *v.* Smith, 2 Barn. and Ald. 500. Jameson *v.* Swinton, 2 Taunton. Rep. 224.

(*z*) Bateman *v.* Joseph, 12 East. 433. Langdale *v.* Trimmer, 15 East. 291.

for itself; if not, the Evidence above-stated will be sufficient. (*a*)

2. The case just now mentioned is, when the indorser or drawer of the Bill, or his residence, is known, so that the notice of the dishonour of the Bill given by letter may be presumed, if sent by the post, to have come to his hand: but it frequently happens that *he is not to be found;* and, when sued, he relies on the want of notice of the dishonour of the Bill in due time, as amounting to a discharge of him. To answer this case, the Plaintiff should be prepared to shew, by a witness, that every degree of diligence and attention on his part was used to find him out; such as by proving inquiries made where he lived last, or in places to which he was known to resort, or of persons likely to know something concerning him, and that all inquiries were ineffectual, or a Letter put into the Post addressed to him at his last known place of abode. (*b*)

Another Case in which the necessity of notice has been dispensed with in Actions against the Drawer of a Bill of Exchange, is when the Acceptor had, either when the Bill was offered for acceptance or payment, no effects of the Drawer in his hands. (*c*) This was matter of Evidence; and could be proved by the Drawer or Acceptor, or any person who knew the state of their accounts or dealing. But the gene-

(*a*) Williams *v.* Smith, 2 Barn. and Ald. 496.

(*b*) Beveridge *v.* Burgis, 3 Campb. 262.

(*c*) Bickerdike *v.* Bolman, 1 T. Rep. 405. Rogers *v.* Stephens, 2 T. Rep. 713. Collot *v.* Haigh, 3 Campb. 281.

ral Rule to that effect, was narrowed by subsequent decisions; and it has been held, that though the Acceptor had no effects in his hand of the Drawer, when the Bill was tendered to him, yet if there were reasonable grounds to expect that there would be funds to answer the Bill in the hands of the Acceptor in due time, he was entitled to notice, which Evidence must come from the Defendant, when the Plaintiff has proved that there were no funds in the Acceptor's hands, and it will be an answer to it. (*d*) And, lastly, if the Defendant can prove that any injury arose to him from want of notice, notice of the dishonour of the Bill is necessary, though the Bill was a mere accommodation one. (*e*)

This Evidence should also be had in cases of actions against the Drawer or Indorser, in which a previous demand on the Acceptor must be proved; but which, if he cannot be found, after inquiries made, and endeavours to find him, proved as stated, will be sufficient Evidence to satisfy the necessity of a demand.

3. Bills of Exchange should be regularly protested for non-acceptance or non-payment, and notice be given to the Person from whom they were received. But there is this difference, that in actions against the Drawer or Indorser on foreign Bills of Exchange a

(*d*) Rucker *v.* Hiller, 16 East. 43. Hammond *v.* Dufrene, 3 Campb. 145. Robins *v.* Gibson, 3 Campb. 334. Claridge *v.* Dalton, 4 M. and S. 226.

(*e*) Cory *v.* Scott, 3 Barn. and Ald. 619.

Protest must be proved to have been made, and be produced, or the plaintiff cannot recover on the Bill: but in the Case of Inland Bills of Exchange, though no Protest has been made, it does not affect the Plaintiff's right to recover on the Bill. (*f*) The Protest is an Instrument under the hand and seal of a Notary Public, and is Evidence of itself.

In the case of Actions upon Promissory Notes, the Rules as to Evidence are the same as those laid down with respect to Bills of Exchange. The maker of a Promissory Note is as the Acceptor of a Bill of Exchange, and must be first resorted to for payment; and as his default creates the liability of other parties on the Note, they must have notice of it in due time: and if sued, they are entitled to call on the Plaintiff, (the holder of the Note,) to prove a demand of payment by him made on the maker of the Note, his default and notice of it to them. It was observed by Lord Mansfield, that a Promissory Note assumes the form of a Bill of Exchange when indorsed, for then the maker of it becomes as the Acceptor; the person to whom it is payable, the drawer; and the Indorsee the Payee.

The Rules, therefore, laid down as to the Evidence on Bills of Exchange will be found precisely to apply to actions on Promissory Notes.

Thus in an action on a Promissory Note by the Payee against the maker, proof of the hand-writing of the latter only is required.

(*f*) Gale *v.* Walsh, 5 T. R. 239. Borough *v.* Perkins, 1 Salk. 131.

If it is by the Indorsee of the Note against the maker, proof of his hand-writing, and that of the Payee, who is necessarily the indorser to the plaintiff, is sufficient.

If the Action is by the Indorsee against the Indorser, (the payee,) proof of the hand-writing of the maker and indorser are required, and *also* of a demand on the maker of it for payment; and his neglect or refusal, and notice to that effect, given to the Defendant.

The Rules as to notice, and in every other respect, are the same.

And note that whenever a witness's name appears to the signing, accepting, or negotiating, any Bill or Note, he must be called to prove it; and, if he denies having seen the Party subscribe his name, the hand-writing may be proved by other means. (*g*)

It is further a very necessary caution to compare the Bill or Note on which the Action is brought with the Record, before it is passed, to see that it accurately corresponds with the Declaration, as any variance is fatal. If there is any variance from negligence or omission, the Record may be amended under a Judge's order, as has been before observed in general cases.

(*g*) Fitzgerald *v.* Elsee, 2 Campb. 636. Fasset *v.* Brown, Peake, N. P. C. 23. Grellier *v.* Neale, Peake, N. P. C. 146.

Of the Evidence on the part of the Defendant in Actions on Bills of Exchange and Promissory Notes.

These matters of defence usually are—Usury, Fraud, (*h*) or that the Bill or Note was given for a consideration contrary to law: that it has been altered in a material part: has not the proper stamp: or was given or signed by the Defendant, without the Defendant's having had or received for it any consideration whatever.

This last defence can only be available between the originally contracting parties themselves; for, if a Bill or Note accepted or made, drawn or indorsed by the Defendant, without his having had or received any consideration for his having done so, is passed to a third person by a *bonâ fide* indorsement, he cannot set up the want of consideration as a defence against *him;* for the act of acceptance or the signing a Promissory Note drawing or indorsing it imports a consideration to all the world. But, as between the Parties themselves, as between the Acceptor and the Drawer of a Bill payable to his own order, or between payee and maker of a Promissory Note, the acceptor of the Bill, or maker of the Note, being in either case sued by the Payee, may set up as a good defence, that there was no consideration; and, if that is proved, the Plaintiff cannot recover.

(*h*) Rees *v.* Marq. of Headfort, 2 Campb. 574. Duncan *v.* Scott, 1 Campb. 100.

1. The defence of usury was at a particular period much resorted to, and was in many instances a source of great injustice; for it was held, until passing the Act of Parliament 58 Geo. III. c. 93. that if a Bill of Exchange, or Promissory Note, had been given for an usurious consideration, all securities being declared by the statutes against usury void in law, the defence of usury could be set up against any Indorsee, even though he had taken the Bill ignorant of the usury, and had given a *boná fide* consideration for it. (*i*) That statute, however, enacts, " That no Bill of Exchange, or Promissory Note, which shall be drawn after the passing of the Act, (June 10, 1818,) shall, though it may have been given for an usurious consideration, or upon an usurious contract, be void in the hands of an Indorsee for a valuable consideration, unless such Indorsee had, at the time of discounting or paying such consideration for the same, actual notice that such Bill of Exchange or Promissory Note had been originally given for an usurious consideration, or on an usurious contract."

The defence of usury, therefore, where the Action is by an Indorsee of a Bill or Note, who is a *boná fide* holder without notice of the usury, is quite taken away, and unless the Defendant can bring home to the Plaintiff, knowledge of the consideration having been originally usurious, he has no defence. The Defendant may, in such case, prove that knowledge, by shewing that the Plaintiff was present when the

(*i*) Lowe *v.* Waller, Dougl. 708. Cuthbert *v.* Haley, 8 T. Rep. 390.

Bill or Note was drawn, and knew on what account it was made; or that he was told of it before he took such Bill or Note. If he is able to do so, it will be no answer for the Plaintiff to shew that he gave for it a *bonâ fide* consideration.

2. It is a good defence to an Action on a Bill of Exchange or Note, that it was fraudulently obtained or given *for a consideration contrary to law*, such as for a gaming debt: (*k*) for stock differences: (*l*) insurance in the lottery, (*m*) and the like. That the consideration was of that description must be proved by a witness who was privy to it, or by some admissions of the Defendant; and if the Action is between the Parties themselves, the defence is conclusive: but it is only available in that case; for if the Bill or Note has been indorsed over, and the Action brought by the Indorsee, it is no defence against him, unless knowledge can be brought home to him of the consideration being of that description, in which case he shall be equally prevented from recovering on it.

What the statute 58 Geo. III. c. 93. therefore enacted in the case of usury, was always the law, where the defence was fraud, or the illegality of the consideration. The Acceptor of a Bill of Exchange, or maker of a Note, could never set up against an Indorsee, that he had accepted the Bill, or drawn the Note, for an illegal consideration; or was induced to

(*k*) Bowyer *v.* Bampton, 2 Stra. 1155.
(*l*) Faikney *v.* Reynous, 4 Burr. 2069.
(*m*) Decy *v.* Shee, 2 T. Rep. 617.

do so by a fraud practised on him by the Payee, unless he could implicate the Plaintiff with full knowledge of it: but such would be good Evidence if the Action was by the Payee himself against the Acceptor or maker of the Note, or knowledge of the illegality of the consideration brought home to the Plaintiff.

3. It is a good defence to an Action on a Bill of Exchange, that it has been altered in a material part from the form in which it was first drawn. (*n*) As the Bill or Note must always be produced at the Trial, any erasure or alteration of a figure, name, or date, will appear on inspection.

The Evidence of this alteration lies on the Defendant, who must prove the original form in which it was drawn, which may be done by a witness who saw it when drawn or made, and who can point out in what an alteration has been made. This must be done; for although an alteration may appear on the face of the Bill or Note when produced, or words palpably written on an erasure, that would not be sufficient, as that might have taken place at the time of drawing the Bill, or signing the Note. The Defendant must prove that the alteration was made after the Bill or Note was issued and put into circulation.

That is the first piece of Evidence required from the Defendant; but it must next appear that the alteration was in a material part. (*o*) Therefore to write

(*n*) Master *v.* Miller, 4 T. Rep. 320. Trapp *v.* Spearman, 3 Esp. N. P. C. 57.

(*o*) Kershaw *v.* Cox, 3 Esp. N. P. C. 246. Knill *v.* Williams, 10 East. 435.

on an accepted Bill where it was to be paid, will not vitiate it: but to alter the dâte, (unless it had first been written wrong by mistake,) sum, or from *sight* to date, will; these are matters of law on which the defence is to rest; it is sufficient to prove them as above. (*p*)

4. The most usual defence in Actions of Bills of Exchange, or Promissory Notes, is want of notice of the dishonour: but, as this is affirmative Evidence on the part of the Plaintiff, that he did give due notice, as stated before; the Defendant has only to see that such notice is proved to have been given to him in due time. If notice was given by letter, to make it Evidence of notice, the Defendant should have had notice to produce the letter. If the Defendant has it, he should produce it; and the Post-mark on the letter will shew the actual time of its being put into the office, which, if it was too late, the Plaintiff will be nonsuited; or he may prove by other testimony the actual time of receiving the notice.(*q*)

But, although the want of notice is a good defence, and none has in fact been given; yet, if the Defendant has made a subsequent promise to pay the Bill, he will be liable. (*r*)

But it is necessary that there should be an express promise to that effect: wherever therefore there has not been regular notice of the dishonour of the Bill

(*p*) See Cases Collected Selw. N. P. 314 note (*w*.) and Brutt *v*. Picard, Ryan & M. 37.

(*q*) *Vide ante*, p. 32.

(*r*) Helps *v*. Alder, 6 East. 16. n.

or Note given to the Drawer or Indorser, so that they would be discharged, the Plaintiff must give in Evidence *an express promise to pay the Bill or Note* to some of the Parties, or holder of them ; and it need not be to the Plaintiff in the Action. This must therefore be attended to in settling the Plaintiff's Evidence, as he must be apprised of notice of dishonour not having been given. (*s*)

5. Another ground of defence is, that the Bill or Note has not the proper stamp ; to see that it has, is the duty of the Plaintiff's Attorney, who produces it in Evidence. Tables of the proper stamps are to be found in every Office or Calendar, by which they may be examined : but the Defendant should examine the stamp at the Trial ; as, if it has not the proper stamp, the Plaintiff cannot give it in Evidence. If on examining it before the Trial it is found to be on an improper one, by stat. 37 Geo. III. c. 136., it may be stamped by the Commissioners on payment of the duty, and of a penalty. That therefore, if necessary, should be done.

The second description of written agreements proposed to be considered was, *Policies of Insurance.*—I shall therefore proceed to lay down :—

1. *The Rules for settling the Evidence in Actions on Policies of Insurance ; and, first, on the part of the Plaintiff.*

(*s*) Borrodaile *v.* Lowe, 4 Taunt. 93. Potter *v.* Rayworth, 13 East. 417.

The Plaintiff in this Action declares in Assumpsit on the Policy. (*t*) The material averments in the Declaration which are necessary to be distinctly proved, are—1. That the Defendant subscribed the Policy.—2. That the Plaintiff was interested to the amount of the sum set opposite to the Defendant's name.—3. That the Ship sailed on the voyage insured; and was lost by some of the risks insured against, and as stated in the Declaration. Or if the Policy was on houses, goods, against fire, Evidence must be given that they so were lost.

The course of Evidence at the Trial at Nisi Prius is, first, to produce the Policy itself, observing that it is properly stamped.—2. To prove that the Defendant subscribed the Policy in the character of an underwriter is the next step; this is either in the Defendant's own hand-writing, or by some Person deputed or authorised by him to sign Policies for him.

If the Policy is subscribed by the Defendant himself, it is sufficient to prove his hand-writing; if it is by another Person in the common form of "A. B. for C. D. (the Defendant) 200*l*. *e. g.*" it will be then necessary to prove such Person's hand-writing, and also that he was authorised by the Defendant to subscribe Policies for him. To prove this, the Party so authorised is the usual, and is in fact the best witness; as he can prove as well the authority given to him for the purpose by the Defendant, as his own subscription of the Policy: but if he is dead, or cannot be brought

(*t*) 1 Esp. Dig. N. P., from 73 to 105.

forward, the Plaintiff must prove that Person's handwriting, and then call witnesses who can speak to the Defendant's having given him such general authority. This may be done either by the admission of the Defendant himself, directly admitting his having given such authority to subscribe Policies for him; or collaterally, by shewing that he had paid losses on Policies so underwritten in his name. The subscription to the Policy, and the circumstances attending it, as to the representation and warranty made at the time, are usually proved by the Broker who effected the Policy. And as concealment of circumstances, any misrepresentation made, or breach of the warranty given to the underwriter before the Policy was underwritten would avoid it, if any question is likely to be raised on them by the Defendant, as matter of defence, what was the actual representation made, or warranty given, should be stated, and make part of the Plaintiff's proofs. But as they are matter of defence for the Defendant, I shall consider them under the head of Evidence for the Defendant.

3. It next becomes necessary for the Plaintiff to prove, that he, (or if the Insurance is by an Agent, that the Principal,) is interested to the amount of what he seeks to recover, that is, as against the Defendant, the sum set after his name on the Policy.

If the Policy is on the Ship, it has been held to be sufficient Evidence for him to shew that he was in possession of her: (*u*) but if there be any doubt in

(*u*) Robertson *v.* French, 4 East. 130.

that respect, or that the Plaintiff's property in her may be disputed, he should be prepared to shew a complete and perfect title under the Ship Registry Acts. It will be mentioned more at large hereafter how such a title is to be made out. (*x*)

If the Insurance is on Goods, the Plaintiff must shew the shipping of them on board the Vessel insured, the value, and that they belonged to him or to his principal. For this purpose (*y*) the Bill of Lading is Evidence to the extent of it, if signed by the Master or Mate, (whose hands-writing must be proved) acknowledging the receipt of the goods, and of the Consignee's interest: (*z*) but if there are the words, "Contents unknown," also signed by them, so that they do not charge themselves with the receipt of any goods in particular, the Bill of Lading is no Evidence either of the quantity or value of the goods, or of the interest of the Consignee. But though this may be a summary mode of proof of interest, the Plaintiff may prove the actual shipping of the goods on board and the value of them, which will be sufficient to support that averment. This may be done by witnesses who knew of such shipment having been made, and of its value. The interest proved at the Trial must correspond with that stated in the Policy, and as averred in the Declaration, as where the interest was averred to be in one person, and the Evidence proved it to be a joint Interest in many, on whose account the Policy was made; the Plaintiff

(*x*) Camden *v.* Anderson, 5 Term Rep. 712.

(*y*) M'Andrew *v.* Bell, 1 Esp. N. P. C. 373. *Haddow v.* Parry, 3 Taunt. 303.

(*z*) Haddow *v.* Parry, 3 Taunt. 303.

was nonsuited. (*a*) But it will be sufficient for the Plaintiff to shew, that he was interested to the extent stated in the Policy, when the risk commenced, though he was not so when the Policy was underwritten, even though it is so averred in the Declaration. (*b*) This being a most material averment, should be accurately attended to.

4. The sailing of the ship on the voyage insured is next to be proved: but as the voyage is always from a Place to some other Port or Place, and the time of her sailing is material, these facts are also necessary to be proved. These facts are generally proved by the Master, Supercargo, or some of the Ship's crew, who, from being on board, are able to speak to the facts: but the loss must be proved to have taken place by means described in the Declaration; as if the loss is stated in the Declaration to have arisen from Capture, it would be a variance if proved that it was by perils of the sea, and would not support the Declaration.

To prove the loss of the Ship, and how it happened, is best done by calling some of the crew who were on board when that happened: or in case of all the crew having perished; by some person who saw the wreck, when the loss was laid to be perils of the sea; or knew of her Capture, or the like.

So an Entry in Lloyd's Book, stating the Loss or Capture of the Vessel insured, is admissible Evi-

(*a*) Bell *v.* Ansley, 16 East. 141. Cohen *v.* Hannam, 5 Taunt. 101. Carruthers *v.* Sheddon, 6 Taunt. 14.

(*b*) Rhind *v.* Wilkinson, 2 Taunt. 237. Abitbol *v.* Bristow, 6 Taunt. 464.

dence of the fact. But the original Entry there must be given in Evidence. (*c*)

It however not unfrequently happens; that a Ship at sea founders, and all the Crew perish, so that there is no Evidence to be had from any of those who had been on board, and the Declaration states the loss to be by perils of the Sea; in that case, the averment of the loss, is supported by Evidence to this effect :(*d*) That the ship sailed at a particular time from the Port from whence she was insured; that the usual time taken to perform the Voyage insured was of a certain period; and, that although that time had long since elapsed, she had never been heard of: this is Evidence to go to the Jury of a total loss.

In this, as in every other Instrument requiring a Stamp, that should be attended to in making up the Proofs for trial: but as in other Instruments any alteration in a material part, after they have been executed or signed, makes them void; in the case of Policies of Insurance it is otherwise; for an alteration is allowed to be made in the terms of the Policy, without making it void, or requiring a new Stamp by stat 35 Geo. 3. ch. 63. But it must be done before the notice of the determination of the risk originally insured. (*e*)

(*c*) Abel *v.* Potts, 3 Esp. N. P. C. 242.

(*d*) Green *v.* Brown, 2 Stra. 1199.

(*e*) Ramstrom *v.* Bell, 5 Maule & Selw. 270.

2. *Of settling the Evidence on the part of the Defendant in Actions on Policies of Insurance.*

Policies of Insurance are construed strictly ; and any failure on the part of the Plaintiff, as to any matter arising under it, or any fraud, will vitiate them wholly. The Defendant's Plea is non-assumpsit, under which he can give in evidence every matter of defence.

The usual subjects of defence are—

1. *That the object of Insurance was illegal ;* as, if the Plaintiff proved the Shipping of Goods to the amount of his interest in the Policy, the Defendant may shew that they were contraband : Enemies' property : (*f*) Goods prohibited to be exported, though described otherwise in the Invoices, (*g*) and the like. This he may give in Evidence under the General Issue.

2. That the Ship when she sailed was not Sea-worthy : (*h*) had a deficient Crew, or unskilful Mariners on board : or had not the necessary Papers and Documents, the want of which might subject her to seizure. Her want of sea-worthiness may be proved by the Master or any of the Crew ; Ship-builders employed on her, or by any one who knew the state of the Vessel. As the number of the Crew depends on the tonnage of the Vessel, Persons acquainted with the proper number necessary should be called as Witnesses.

(*f*) Bristow *v.* Towers, 6 Term Rep. 35.
(*g*) Johnston *v.* Sutton, Dougl. 241.
(*h*) Law *v.* Hollingsworth, 7 T. Rep. 161.

3. *That there was a Concealment of Circumstances.* —Such as, in case the Ship had sailed, omitting to state when she was last heard of, (*i*) though the fact was known to the Insured when he got the Policy subscribed, and was material as affecting the risk: so neglecting to state whether she had met with bad weather, and been forced into another Port, the Insured knowing at the time that she had met with bad weather and been materially damaged. In fact, the concealment of any circumstance which may vary the risk insured against, will have the effect of avoiding the Policy. To support this defence the Defendant must prove, according as the fact is, that he was deceived in the risk which he meant to underwrite.

4. *That there was a false Representation;* (*j*)—such as, that the Ship was seen in a particular place or latitude at a particular day, which turns out to be otherwise: That it was represented that she had such a Crew, or so many guns, which she had not; and these representations, though made by the Insurance Broker, shall avoid the Policy. (*k*)

In this case, as in the last, the Defendant's Evidence must be of what passed when the Policy was underwritten; and it must be falsified, and by the same Evidence, except that in case of a false representation, the Defendant, if he is a late Underwriter on

(*i*) 1 Esp. Dig. N. P. 86. Per Lord Mansfield, in Carter *v.* Boehm, 3 Burr. 1909. Seaman *v.* Fonnereau, 2 Stra. 1183. Park. on Insur. 181. Lynch *v.* Dunsford, 14 East. 494.

(*j*) 1 Esp. N. P. Dig. 81. M'Dowall *v.* Fraser, Dougl. 247.

(*k*) Edwards *v.* Footner, 1 Campb. 530.

the Policy, may give in Evidence a representation made to the first Underwriter on it, and which *he* may be called upon to prove. (*a*)

5. *That there was a false Warranty.* (*b*)—This only differs from a representation in this respect, that it makes part of the Policy, it being written on it. If written on a distinct piece of paper, or wafered to it, it will not be sufficient as a warranty; though, if written in the margin of the Policy, or transversely on the face of it, it would. (*c*) Any defect or failure in the circumstances so warranted, renders the Policy absolutely void. Such as if a ship is warranted to be a neutral; to carry so many guns; to be in Port when the Policy is signed: when in fact she is enemies' property: carries a less number of guns than is stated in the warranty: or had sailed: or if it was to sail with Convoy, when she had not done so. All these being falsified by the Defendant, are good Evidence to defeat the Action.

In preparing the Evidence where a Warranty or a breach of it is meant to be relied on; the Policy itself must be examined, to see that it is written on the Policy itself; (*d*) then what the Warranty was, appears by the production of the Policy itself, and the breach of it may be proved by witnesses who know the facts. These are generally the Seamen who served on board the Ship insured, and know all the facts relating to her and the voyage. But what cir-

(*a*) Barber *v.* Fletcher, Dougl. 292.
(*b*) 1 Esp. Dig. N. P. 82. De Hahn *v.* Hartley, 1 T. Rep. 343.
(*c*) Pawson *v.* Watson, Cowp. 785. Dougl. 12, Cases *in Rot.*
(*d*) *Supra.*

cumstances were mentioned, or Documents shewn to the Defendant before he underwrote the Policy, or what representations were made to him at the time, is matter of *vivâ voce* proof.

What the representations were, and what Documents were produced, the Broker who effected the Policy is the usual witness to prove: but as he is for the most part favourable to the Insured, and may state the representations made by himself differently from the truth, he may be contradicted, or Evidence in chief be given by persons who heard them made to the Defendant himself, or who knew of the representations made to the first Underwriter on the Policy, which, it has been observed, is Evidence of the actual representation made by the Broker when the Policy was first underwritten;(e) and though made to one Underwriter only, is available to all, for which purpose that Underwriter may be himself called: and that he may be benefited by the verdict, goes to his credit only.

If the facts turn out to be different from the representation, it avoids the Policy: but those facts are matters of positive Evidence.

Thus, *e. g.* the Defendant may prove (as in the case of a warranty, *ante*, p. 52.) that the Ship represented to be in Port had in fact sailed some days before: that she had met with a gale of wind, by which her timbers were strained: (*f*) that, though represented to have a certain Crew, she had not so

(e) Wilson *v.* Ducket, 3 Burr. 1361. (*f*) 1 Esp. Dig. N.P. 81.

many on board. It is impossible to enumerate all the circumstances at length, forming matter of defence; it is sufficient to observe, that it is a contract *strictissimi juris*, and good faith in the entering into it, and in the performance of it, are always required; therefore, the smallest deviation, except for good cause, from the direct course of the voyage, avoids the Policy. (*g*) This deviation may be proved by any one on board, or by Persons on board another Ship who saw her out of her latitude and course of the voyage; which, although *primâ facie* Evidence of a deviation, is not conclusive, as she may have been forced out of her course from necessity, such as by contrary winds, from having received some injury which it was necessary to repair, and such like causes. But the necessity must appear to be inevitable; and when a deviation has taken place, those circumstances must be proved by the Plaintiff to account for it. But, independently of express contract, there is this implied; *viz.* that the Ship at the commencement of the voyage was sea-worthy; properly documented for the voyage; and of the country described in the Policy, if not an English vessel. The fact of sea-worthiness is usually proved by calling Ship-builders, or Persons acquainted with Shipping, to speak to the fact.

But it should be observed that the Protest of the Captain, is in no case Evidence of the facts contained in it, nor are the *written opinions* of Persons who surveyed the Ship, as to her sea-worthiness.

(*g*) Beatson *v.* Haworth, 6 T. Rep. 531. 1 Esp. Dig. N. P. 89.

In questions concerning losses, the Sentences of Courts of Foreign Judicature are good Evidence, and are given in Evidence by producing copies of the Judgment under the Seal of the Court: (*h*)

Any alteration in the body of the Policy in a material part makes it void:—proof therefore of that alteration being made, given by the Defendant, will defeat the Plaintiff's Action. *Aliter,* if an immaterial one.(*i*) It is therefore matter of Evidence at the Trial to prove by a witness, in what the alteration took place.

With respect to *vivâ voce* Evidence.

1. The Consignee of the Cargo is a good witness to prove the interest. (*k*)

2. To disprove barratry, the Master of the Vessel is an inadmissible witness, unless released by the underwriter. (*l*)

3. If the sea-worthiness of a Vessel is disputed in an Action on the Policy, (*m*) the best Evidence is, either that of the Persons who repaired her before the voyage, or who surveyed her before she sailed: but the Captain or any of the Crew may prove the

(*h*) Henry *v.* Adey, 4 Esp. N. P. C. 228. Vid. 1 Esp. Dig. N. P. 177. Havelock *v.* Rockwood, 8 T. Rep. 268.

(*i*) Campbell *v.* Christie, 2 Stark. 64. 4 Moore 5. Sanderson *v.* Symonds, 1 Brod. and Bing. 426.

(*k*) 1 Esp. Dig. N. P. 175. Haddow *v.* Parry, 3 Taunt. 303.

(*l*) Bird *v.* Thompson, 1 Esp. N. P. C. 339.

(*m*) 1 Esp. Dig. N. P. 89.

same. But it must in all cases be observed, that it is sufficient to prove her sea-worthy at *the time of her sailing.* (*n*) But the Defendant proving that she became not sea-worthy very soon after her sailing, is strong presumptive Evidence of antecedent inability to perform the voyage insured; and the Plaintiff should therefore have Evidence, if possible, to prove her sea-worthy when she sailed. (*o*)

II.—Having now stated how the Evidence is to be settled in Actions on Bills of Exchange, Promissory Notes, and Policies of Insurance, which are contracts wholly in writing, I shall proceed to consider the Evidence necessary in this Action, on Contracts, which may be either by parol or in writing; and point out in what manner it is to be settled for Trial, premising this observation, that all Contracts in writing, if not under the Seal, are deemed in law to be parol. Such Contracts can only be tried in the Action of Assumpsit: if they are under seal, the Action must be Debt or Covenant; and if the Plaintiff declares on a written agreement, which when produced in Evidence appears to be under seal, he must be nonsuited.

The principal heads under this head are Actions: —1. For Use and Occupation.—2. On Special

(*n*) Park. Ins. 220.
(*o*) Watson *v.* Clark, 1 Dow. 344. 348.

Agreements.—3. On Contracts of Sale.—4. On Wagers.—5. On the common Counts in this Action

1. *Of the Settling the Evidence in Assumpsit for Use and Occupation.*

First, On the part of the Plaintiff.

This form of Action is now used in place of the Action of Debt for Rent: but the latter Action still may be maintained. The Declaration is general, "That the defendant was indebted to the Plaintiff for the use and occupation of certain lands, tenements, and hereditaments, before that time held, used, occupied, and enjoyed by him, by the permission of the Plaintiff, &c.;" and it is proved either by witnesses or by writing which specifies the agreement; (*p*) and in settling the Evidence, these rules are to be observed.

1. Where the proof is by witnesses without writing.

1. Where the Defendant has become Tenant to the Plaintiff (*q*) by a taking from him by a direct contract, no further Evidence is required on the part of the Plaintiff, than to prove, that he let the Premises to the Defendant, whether they are Lands, Houses, Lodgings, or Tenements of any description, at a certain Rent, or that he let him into possession of them as Tenant: That the Defendant occupied them as such, either by himself or his Tenant (*r*) or

(*p*) Wilkins *v.* Wingate, 6 T. Rep. 62.
(*q*) 1 Esp. Dig. N. P. 29. Cas. *ibid.*
(*r*) Bull *v.* Sibbs, 8 T. Rep. 327.

servant, for the time for which the Plaintiff seeks to recover Rent. He must then prove the amount of the Rent reserved, if there was an agreement for the Rent to be paid; or if not, what is the yearly value of the Premises; or if let by the quarter, month, or week, the value for that time.

But if the Defendant has ever paid Rent to the Plaintiff, proof of that alone establishes the Plaintiff's right to recover; (*s*) and then the *quantum* due only, is matter of Evidence as before stated.

So if the Plaintiff at any time before had distrained on the Defendant for rent in arrear, and he did not replevy, it is conclusive Evidence of the Plaintiff's title, and the Defendant cannot controvert it. (*t*) The fact of a former payment of rent may be proved by *a receipt,* which the Defendant had taken for the rent, which he should have notice to produce, or by a witness who saw him pay the rent and take the receipt. The fact of the making a distress is best proved by the Broker who made it.

2. Such is the case where the Plaintiff has himself let the Premises to the Defendant, or where the Defendant has paid him Rent: but if the Plaintiff claims as Heir, Executor, or Administrator, Devisee, Legatee, or Assignee of the first Lessor, and the Defendant has never paid him rent, then further Evidence is required to establish his title to it. In all these cases, therefore, the Plaintiff must first

(*s*) Hearn *v.* Tomlin, Peake N. P. C. 192. Kirtland *v.* Pounsett, 2 Taunt. 145.

(*t*) Panton *v.* Jones, 3 Campb. 372.

shew, that the Defendant held as Tenant to the Person under whom he derives title; by the same Evidence as above stated where the Action is by the original Lessor. Having done so, if the Plaintiff's title is as Heir, he must prove his ancestor's death, and that he is Heir to him; this is, where the Lessor was seised in fee. If the Plaintiff claims as Executor or Administrator, he must make *profert* of the Probate or Letters of Administration, which will be sufficient, if there is no Plea of *ne unques Executor or Administrator;* if there is such Plea, the Probate or Letters testamentary must be produced. This is the case, where the Lessor was himself only entitled as Lessee for years to some other Person, in which case the term passes to the Executor or Administrator of the deceased.

3. *If a Devisee or Legatee is the Plaintiff,* and the Lessor was seised in fee, the Plaintiff must prove the Testator's will, by producing the will itself, and calling the witnesses to it to prove it; for which see post, *pleniùs,* Chap. on Ejectment. But if the Plaintiff is a Legatee, and the deceased had himself but a term for years in the Premises, which *he had bequeathed to the Plaintiff,* he must produce the Probate of the Testator's will, in which the Premises in question are bequeathed to the Plaintiff; and he must also shew the assent of the Executor to the Devise, as necessary to give him a title to the Lease, by virtue of which he claims to be entitled to the Rent. (*u*) The assent of the Executor is proved, either by Evidence

(*u*) Doe *v.* Guy, 3 East, 120.

of an express assent in words, or by his suffering the Legatee to take undisturbed possession of the Premises bequeathed, and receive the rents and profits.

4. *If the Plaintiff claims as Assignee* of the Lessor, he must make out a regular title from him, by proving the several Deeds and Conveyances giving him title. But it must be observed, as a general rule in settling Evidence for Plaintiffs in this Action, that proof of title is only required, where the Plaintiff is a Person whom the defendant has never recognized as his Lessor; for, as has been observed, where the Action is between the originally contracting Parties, (*u*) proof of the taking of the Premises from the Plaintiff, and the occupation by the Defendant by his permission, or if the Defendant has paid him Rent, or if a distress has been made on the Defendant for Rent, and it has been levied under it; all these cases, on being proved, are sufficient Evidence of the Plaintiff's title; and the Defendant cannot call for any other, and is himself precluded from impeaching it. (*x*)

But in all the Cases, the Plaintiff having established his title in the Character in which he sues, must prove the Defendant's occupation and the quantum of rent due.

2. Where the proof is by writing.—

Although the facts above stated may be proved by

(*u*) Morgan *v.* Ambrose, 1 Esp. Dig. N. P. 31. MS.
(*x*) Panton *v.* Jones, 3 Camp. 372. Cook *v.* Loxley, 5 T. Rep. 4.

witnesses; yet if there was any *agreement in writing*, not by Deed, between the Parties, specifying the letting, the term, the rent, &c. the Plaintiff may give this in Evidence by Stat. 11 Geo. 2. c. 19. under the general Count in Assumpsit: "That the Defendant was indebted to the Plaintiff in £—— for the use and occupation of a certain dwelling-house, *e.g.* before that time held, used, occupied, and enjoyed by the Defendant by the Plaintiff's permission, &c."

But where there is such a Writing, the Party cannot give parol Evidence of the agreement or go for the claim of rent, on the general Evidence of an holding. (*y*) The Writing itself must be therefore produced; and if it requires a stamp, and is not stamped, the Plaintiff must fail in the Action, for he cannot give parol Evidence of what is reduced into writing; and as that which contains the agreement in writing is not admissible in Evidence for want of a stamp, this proof must totally fail. (*z*) In settling the Evidence therefore, where the agreement for the holding is in writing, it should be examined whether it is stamped or not; if not stamped, it should be stamped before Trial; and this the Party is empowered to have done, by stat. 37 Geo. 3. ch. 136. on payment of the duty, and a penalty of 5*l.*

But if the Plaintiff proves the letting of the Premises to the Defendant, and there is no proof that the tenancy is ended, it is not required of him to prove

(*y*) Preston *v.* Merceau, 2 Black. 1249.

(*z*) Brewer *v.* Palmer, 3 Esp. N. P. C. 213. Doe d. St. John *v.* Hore, 2 Esp. N. P. C. 724. and Ramsbottom *v.* Mortley, 2 M. and S. 115.

that the Defendant actually entered and occupied them; it is sufficient that the Defendant might have done so if he pleased, and was not prevented by the Plaintiff. For having taken the Premises, he is liable to the rent of them, till he proves that he had put an end to his holding; and his having ceased to occupy them is no answer to the action; for the Lessor has a right to consider him as his tenant, until he has by a regular notice or otherwise put a legal end to his Tenancy.

Of settling the Evidence on the Part of the Defendant in Assumpsit for Use and Occupation.

The Defendant may give in Evidence under the Plea of non-assumpsit every matter of legal or equitable defence. He may shew—

That the Premises were let for an unlawful purpose, as for a Brothel, for example; and the Plaintiff in such case cannot recover. (*a*)

That though the Defendant entered and occupied the Premises, (*b*) it was not in the character of a Tenant, but that he was let into possession on a treaty for a sale of them, which was not carried into effect. (*c*)

That the Lessor was bound to put the Premises into repair before the Defendant took possession,

(*a*) Girarday *v.* Richardson, 1 Esp. N. P. C. 13.
(*b*) Hearn *v.* Tomlin, Peake N. P. C. 192.
(*c*) Kirtland *v.* Pounsett, 2 Taunt. 145.

which he had not done, and that they were not habitable. But it will not be a defence that the Premises were burnt down. (*d*)

It has however been held, that though the Defendant the Lessee cannot controvert his Lessor's title; yet he may shew that it is at an end, and that he has been called upon to attorn to another. (*e*) So he may shew that the Lessor was Executor *durante minore ætate* of A. B., and that A. B. became of full age and claimed the Rent; that the land was copyhold, and forfeited to the Lord of the Manor to whom he paid Rent: but in such case the Defendant must go further, and shew that the Person from whom he took the Premises was informed of it, and that he renounced his Tenancy, and entered into a new contract with the Person under whom he then claims. (*f*)

All these matters are proveable by *vivâ voce* Evidence.

2. *Of settling the Evidence in Actions on Special Agreements.*

First, On the part of the Plaintiff.

Special agreements are the objects of this Action of Assumpsit; and such agreements may be either verbal or in writing, on either of which the Action is maintainable, except that in particular cases under

(*d*) Baker *v.* Holtpzaffell, 4 Taunt. 45.

(*e*) 1 Esp. Dig. N. P. 31. *vid. post.*, chap. Replevin.

(*f*) Balls *v.* Westwood, 2 Camp. 11.

the Statute of Frauds, no Action can be brought on them unless they are in writing. These cases are:— 1. Where it is to charge an Executor or Administrator to answer damages out of his own estate. 2. To charge Defendant for the debt, default, or miscarriage, of another. 3. Where the agreement is in consideration of Marriage. 4. Where it is on a contract for the sale of the Lands, Tenements, or Hereditaments, or any interest in them. 5. Where the agreement is not to be carried into effect within the year; in all of which, if there is no Note in Writing, no Action can be supported on them. In preparing therefore for Trial, the first preparatory step where the Action comes under any of these Cases is, to see, if there is a Note in writing from the Defendant correspondent with the Declaration. The clearest Evidence by parol being inadmissible. (*g*)

The decisions on which will be found in the law of Nisi Prius, as referred to below: (*h*) but this general Rule of Law must be attended to, that where an agreement has been reduced into writing, it must be proved by the writing itself; and cannot be done by parol Evidence, unless it is proved to be lost, or in the possession of the opposite Party who refuses to produce it, after notice to do so.

Where the *Action is on a special agreement which has been reduced into writing*, it is first necessary, in settling the Evidence, to see that if it is an Instrument

(*g*) *Vide* Clause of the Statute, *post*—(under head of *goods sold and delivered.*)

(*h*) 1 Esp. Dig. N. P. 123. *et ultra.*

which requires a stamp it is properly stamped; and such is necessary, whether the agreement is specially declared on, or it is a Paper to be given in Evidence, in any way, in support of the agreement on which the Plaintiff seeks to recover, for so are the words of the Act of Parliament.

But on Agreements in these cases following, no Stamp is required. (*i*)

1. If the Action is on agreement or memorandum for granting a Lease at rack rent, of any Lands or Tenements under the yearly rent of 5*l.*

2. If the memorandum or agreement is for the hire of any labourer, manufacturer, or menial servant.

3. If it is a memorandum, letter, or agreement made for, or relating to any sale of goods, wares, or merchandise.

As in preparing for Trial where the sale and delivery of goods is by memorandum, letter, or agreement, the terms of which are of course different; it is necessary to be well apprised of what Instruments of the above description require a stamp, and what not.

In 2 Barn. and Ald. 781. Abbott, C. J. lays down the Rule to be, "that stamps are not required for those Instruments only in which the sale of goods is the primary object;" upon which principle (*j*) a

(*i*) Vid. Stat. 48 Geo. 3. 149.

(*j*) Currie *v.* Edensor, 3 T. Rep. 524.

broker having purchased goods for his principal, guaranteed any loss in the resale, for, &c. *per cent.* by an unstamped Note, it was held to be good. (*f*) When Defendant agreed by a Note in writing unstamped to take one half of the goods bought by the Plaintiff on their joint account, and to furnish one half of the money, it was held to be good. But where the principal sent Bills to his factor on which he wanted to raise money, to be accepted by the factor, and for which the principal promised to provide, if goods of his then in the factor's hands were not then sold, this being by letter, and unstamped, was held to be inadmissible, for the primary object was the raising of the money, not the sale of the goods. (*g*)

So a *guarantee* for the payment of goods delivered to another was held to require no Stamp. (*h*)

4. If it is a memorandum or agreement made between the master and mariners of any ship or vessel for wages, on any voyage coastwise, from Port to Port in Great Britain.

5. On any letter containing any agreement in respect of any merchandise or evidence of such an agreement, as shall pass by post, between merchants and other persons, carrying on trade or commerce in Great Britain, and residing, and actually being, at the time of sending such letters, at the distance of fifty miles from each other.

(*f*) Venning *v.* Leckie, 13 East. 7.

(*g*) Smith *v.* Cator, 2 Barn. and Ald. 778.

(*h*) Whitworth *v.* Crockett, 2 Stark. 431. Warrington *v.* Furbor, 8 East. 242.

6. On any label or memorandum containing the heads of insurance to be made by the Royal Exchange or London Assurance Company.

In all these cases, any paper writing relating to them may be given in Evidence without a Stamp.

By statute 55 Geo. III. c. 184. schedule, part 1, no Stamp is required unless the matter of the agreement is of the value of 20*l*. or upwards.

But when the Action is for a collateral matter, though arising under a transaction or sale of goods, which are of greater value than 20*l*., the agreement may be given in Evidence without a Stamp, where it does not exceed that sum; as in an Action against a Carrier for the loss of a parcel of country bank notes of the value of 260*l*., an agreement between the Parties by which the Carrier stating "that he had received of the Plaintiff a paper parcel directed to Messrs. Hoare, Barnett and Co., Lombard-street, London, promised to deliver it the following day," but which was lost, was held to be admissible without a Stamp; for the subject matter of agreement was not for 260*l*., the value of the Notes; but respected the price of the carriage, which was proved to be under 20*l*. (*i*)

So where the Action was against a wharfinger for negligently shipping goods of the value of 600*l*.: a paper, being a receipt for those goods to be forwarded

(*i*) Latham *v*. Rutley, Ryan and M. 13.

in a particular way, was on the same grounds held not to require a Stamp. (*k*)

Where there is a special agreement, entitling the Plaintiff to any thing, such as, *e. g.* payment or wages for work done for the Defendant, and he seeks to recover damages for the breach of it; as long as it is executory, (*l*) that is, as long as it is unperformed *in toto,* the Plaintiff is bound to declare on it: but if it has been performed, or has been rescinded or prevented from being carried into effect by the other Party, (*m*) then the Plaintiff may declare generally, and give the written Instrument in Evidence; as, for example, if a Sailor was to enter into a written agreement for a voyage, and the Captain refused to let him serve, or sailed without him, (*n*) by which he lost the whole or any part of the voyage, and an Action is brought by the Sailor, the Plaintiff must declare on the agreement, and go for the special loss: but if he had performed the voyage, he might declare generally for work and labour. In settling Evidence therefore, under such circumstances, these points must be attended to.

1. *If the Declaration is special on the Agreement, that is, setting out the Agreement, and assigning breaches of it.*

(*k*) Chedwick *v.* Sills, Ryan and M., N. P. C. 15.

(*l*) Esp. Dig. N. P. 160. *Per* Lord Mansfield, in Weston *v.* Downes, Dougl. 24. Towers *v.* Barrett, 1 T. Rep. 134. *Per* Eyre, C. J. 1 Bos. and Pull. 297.

(*m*) Hulle *v.* Heightman, 2 East. 145. Giles *v.* Edwards, 7 T. Rep. 181.

(*n*) *Per* Eyre, C. J. in Poulter *v.* Killingbeck, 1 Bos. and Pull. 397.

In settling Evidence in Actions on special agreements, where the Plaintiff declares specially on the agreement, great care is required; (*n*) every material averment in the Declaration must be proved precisely as averred in it, and the smallest variation in a material part is fatal. (*o*) This, in the case of special agreements which have not been reduced into writing, often happens: but when the agreement is in writing, as the Declaration, is drawn from it, there is little danger of a variance in proving the contract to be as laid in the Declaration as it is proved by the agreement itself; the failure in that case can only take place where there is a defect in the proof of the breach. If the contract or agreement is by parol, there is danger not only as to proof of the agreement, but also of the breach.

In settling the Evidence in Actions on written agreements, the first step is to compare the agreement which is to be given in Evidence with the Declaration, 1st, to see that there is no variance; 2ndly, that it is in such legal form as will entitle the Plaintiff to recover; for if the agreement is one, which is required to be in writing under the statute of Frauds, as, *e. g.* that for the debt of another, the agreement must contain the whole of the consideration for what the Defendant is called upon to do, that is, what the Plaintiff seeks to recover; and it must appear on the face of the paper itself, and cannot be proved by parol. Where it does, proof of the agreement is alone sufficient

(*n*) Esp. Dig. N. P. 162. Penny *v.* Porter, 2 East, 2. Baptiste *v.* Cobbold, 1 Bos. and Pull. 7. Wildman *v.* Glossop, 1 Barn. and Ald. 9. Gladstone *v.* Neill, 13 East, 410.

(*o*) Cotterill *v.* Cuff, 4 Taunt. 285.

Evidence for the Plaintiff, and he is then called upon to prove his damages only, (*p*)

1. At the Trial, the course of Evidence is this: If the Plaintiff declares on an agreement *in writing*, it must be produced; and if there is a subscribing witness to it, he must be called to prove it.

If the Plaintiff declares on an agreement by parol, a witness who was present at the making of it must be called to prove what it was. His testimony should be taken down in writing and compared with the Declaration; for in this as well as in the former case, unless the agreement produced, or that which is so proved by a witness, is found to correspond with that laid in the Declaration, the Plaintiff will be nonsuited.

Thus, for example, where the Plaintiff declared on an agreement "to deliver 40 sacks of corn on a particular day," and the agreement was proved to be 40 *or* 50; that was held to be a clear variance. (*q*)

2. Having proved the agreement, the next piece of Evdence which the Plaintiff must give is, *in case any thing was to be previously done by himself, to prove that he has done it; or that he was ready and willing to perform it, and offered to do so.*

As if the Plaintiff declared on a breach of an agree-

(*p*) Saunders *v.* Wakefield, 4 Barn. and Ald. 595.

(*q*) Penny *v.* Porter, 2 East. 2. 1 Lord Raym. 735. Hockin *v.* Cook, 4 T. Rep. 314. Cook *v.* Munston, 1 New Rep. 351. Churchill *v.* Wilkins, 1 T. Rep. 447.

ment, by which the Defendant promised to pay him a sum of money in consideration of his executing to him a general release, the Plaintiff must aver and prove that *he either did execute* such a release, or was ready to do so; for until he does so, he has no cause of Action. (*r*) The release can only be proved by the production of the Deed itself, and the execution of it proved. His readiness or offer to do so is matter of parol Evidence by a witness who heard the offer to do so made by the Plaintiff.

The best direction on this point is to observe carefully the averments in the Declaration; for unless all that is necessary to give the Plaintiff a right of Action under the agreement is averred in it, the Judgment will be arrested if the Plaintiff has a verdict, and all these must be proved.

The averment of "though thereto often requested," which is in every Declaration in Assumpsit, does not in most cases require any Evidence of it to be brought into the Proofs, nor in any, unless the Plaintiff's cause of Action does not arise, until a request made. Where it does, it must be proved; for a request proves notice to the Party who is to do any thing, as well as is a demand to have it done. Thus if the Defendant on a sale of wood, agreed to pay for one load as much as the Plaintiff sold the remainder for per load, the Plaintiff can maintain no Action until he has informed the Defendant what he sold the rest for per

(*r*) Collins *v.* Gibbs, 2 Burr. 899. Morton *v.* Lamb, 7 T. Rep. 125. Rawson *v.* Johnson, 1 East. 203. Waterhouse *v.* Skinner, 2 Bos. and Pull. 447.

load, and demanded payment at that rate. (*s*) But if there was an agreement between the Plaintiff and the Defendant, that the Plaintiff should make *e. g.* a set of sails for the Defendant, and that he should pay for them 40*l.* on request, the making and delivery of the sails is all the Evidence required from the Plaintiff; for the delivery establishes an immediate demand, and the request is not necessary to the Action (*t*)

But in some cases the Plaintiff must go further than averring a performance or readiness to perform his part: he must shew that *he had a right* to do that which he promised, and which is the foundation of the Defendant's promise; as, if he declares on the Defendant's promise to pay a sum of money on the assignment of a lease, he must give Evidence of his title to the Lease, (*u*) and prove it in the same manner as if he had declared on his own title to it.

3. The third matter of Evidence which the Plaintiff must prove is, *the breach by the Defendant.* Thus, if the Defendant was to build a house for the Plaintiff by a certain day, he should call a witness to prove that no house was built: but this Evidence is unnecessary, where it lies on the Defendant to prove performance of his part. So if the Declaration was on an agreement that the Defendant was to pay 100*l.* on the delivery of 50 quarters of Corn at a particular place, it is sufficient for the Plaintiff to prove the

(*s*) Holmes *v*, Twist, Hob. 51.

(*t*) Wallis *v.* Scott, 1 Stra. 88.

(*u*) Luxton *v.* Robinson, Dougl. 598. Mason *v.* Corder, 2 Marsh. 332. 7 Taunt. 9. S. C. Phillips *v.* Fielding, 2 H. Bl. 123.

delivery at the place; and it lies on the Defendant to prove the payment. This may be done by the production of the Plaintiff's receipt for the money, or by a witness.

4. The last piece of Evidence the settling of which is to be attended to, on the part of the Plaintiff, *is of the Damages.* These are either general or special, as laid in the Declaration; and are either liquidated or unliquidated. If the agreement states the sum agreed on as liquidated damages, for the breach of it, the Plaintiff can only recover the amount; and nothing more is required than to prove the agreement and breach: but if no sum is specified, so that the damages are unliquidated, then the Plaintiff must prove the damages as laid in the Declaration to such an extent as he can.

Thus, for example, if Plaintiff declares on a breach of an agreement by the Defendant, to deliver certain goods by a particular day, and then avers as special damage "that he was deprived of the opportunity of selling them to advantage," he may give in Evidence that a particular person would have purchased them at an advanced price, and call that person to prove it; or that there was a considerable rise in the market for such goods, and where he could have sold them to advantage; and then, what he lost on the Sale he may recover in damages, which are governed by the amount of the advanced price which he might have had.

Where the Damages are laid generally in the con-

clusion of the Declaration, they are those only which are stated in the Counts of the Declaration; as thus, if the Declaration was for goods sold and delivered, and the breach assigned that the defendant had not paid for them, the damages are merely the price of the goods, and the Plaintiff cannot recover any thing beyond their value, and no evidence is admissible beyond it, but if there has been any special damage laid, such as "that by the Defendant's non-payment at the time specified, the Plaintiff sustained a loss," as by losing the sale of them; that must be specially laid and proved accordingly. In settling the Evidence therefore that should be attended to, as if there is no special damage laid, the Evidence is confined to the value of the goods, which only should be inserted in the Proofs.

2. *If the Declaration is general,* that is, where the Plaintiff sets out no agreement, and declares for work and labour, or money had and received generally, though the Action is founded on an agreement: the Plaintiff in that case must be prepared to prove the agreement, and also where any thing was to have been previously done by himself, to prove, that it was performed by him in all respects, as, *e. g.* If the Plaintiff was to receive a sum of money on doing certain work by a certain time, or in a particular manner: when he has done it, he may declare generally for work and labour, and give the agreement and proof of his performance in Evidence under that Count. (*x*)

So he may declare generally in these Counts, if the

(*x*) Poulter *v.* Killingbeck, 1 Bos. and Pull. 397.

agreement has been rescinded, (*y*) or the Defendant is unable to perform what he undertook, or by his own act has prevented the Plaintiff from doing his part; where something was to have been done by him to gain him a right of Action. (*z*) But in all cases of declaring so generally, where there was a special agreement, the Plaintiff is bound to prove at the Trial of the Cause, that the agreement was at an end, or incapable of being carried into effect for some of those causes; for until it is completed, that is while it remains executory, no Action can be maintained on it. (*a*)

Thus, if the Action is Assumpsit for money had and received, to recover a deposit made on a Sale of goods by Auction, under certain particulars of Sale; where the Auctioneer refuses or is unable to deliver the things sold; or if made on the Sale of an Estate, the title to which is defective, so that the Buyer is not compellable to complete the purchase, or the Seller is unable under the Particulars of Sale, to complete it within the time specified; in all those cases, the Plaintiff may recover back his deposit, and declare for money had and received. But at the Trial, he must prove the Sale by Auction: the Particulars delivered by the Auctioneer: that he was declared the best Bidder, and that he paid the sum for which the Action is brought, as a deposit: this is usually done by the Auctioneer's receipt and proof of his hand-writing. The Particulars are sufficient Evidence of the

(*y*) Hull *v.* Heightman, 2 East, 145.
(*z*) Giles *v.* Edwards, 7 T. Rep. 181.
(*a*) Waddington *v.* Oliver, 2 New Rep. 61.

terms of the Sale; they must be produced, and proved to have been delivered at the time and place of Sale, and those under which the Sale took place; and if they are not complied with on the part of the Auctioneer, the Party has an immediate right to recover his deposit by the Action for money had and received; but if the thing sold was to be delivered by a given time, or a good title shewn to an Estate sold, within a given period, the Plaintiff should prove that he applied for the thing sold, and that the time for delivering it was expired when the Action was brought, or for an abstract of the title to the Estate at the time specified in the Particular, and that he could obtain neither. So if he discovers that the Seller had no title or a doubtful title (*b*) to what the Auctioner sold, as if the Auctioneer furnished an abstract of the Seller's title to the Estate sold by Auction, and it appears on the face of it that the title is bad, or that is bad at Law, though good in Equity, (*c*) the Buyer may sue for and recover his deposit, declare generally, and recover on proof of these facts.

2. *Of the Evidence for the Defendant in Actions on Special Agreements.*

The Evidence for the Defendant must be conformable to his Pleas: but as almost every defence is admissible under *Non-Assumpsit*, that is the only Plea considered here and the Evidence applicable to it.

The best positive Evidence in answer to the Plaintiff's case, which the Defendant can give; is *perform-*

(*b*) Wild *v.* Fort, 4 Taunt. 334.
(*c*) Maberly *v.* Robins, 5 Taunt. 625.

ance, or that he was willing to perform his part, and offered to do it, and that the Plaintiff refused to receive it; as if the Action was grounded on an alleged non-performance by the Defendant, of an agreement, by which he was to assign a Lease to the Plaintiff, and which the Plaintiff refused to accept, on the ground of a want of title; the Defendant may go into Evidence to shew that he had a good title; and if he had, the Plaintiff must fail in his Action, for if the Defendant had a good title, and the Plaintiff refused to accept it; he had no right of Action.

So if the Plaintiff declares generally, and gives a special agreement in Evidence, in support of his Declaration; as the Plaintiff should declare on the agreement as long as it is executory, if it appears by the Evidence, either of his own Case, or of that brought forward by the Defendant, that the Plaintiff has but partially performed what he was to do, so that something remained for him to do, to complete his part of the contract, the Defendant would nonsuit the Plaintiff; for while any thing remained to be done by the Plaintiff, the agreement was executory, and he should have declared specially on it:(*d*) but, as has been before observed, the Plaintiff may shew, that the agreement was rescinded or performed on his part.

So if the Plaintiff declares for non-performance of an agreement, the Defendant may shew that he was prevented from performing it by the Plaintiff himself; as if the Defendant was to finish an house for the

(*d*) Waddington *v.* Oliver, 2 New Rep. 61.

Plaintiff by a given time, *the Plaintiff finding timber,* Defendant may shew that the Plaintiff refused to do so.

2. Assumpsit will lie on an *Award made under a parol reference:* but as the reference is generally by Bond, the remedy for the non-performance is under the Arbitration Bonds. See post, same head in Chapter of Debt.

As to the Evidence. If Parties agree verbally, or by writing not under Seal, to abide by the decision of a third Person, as to their mutual claims, and he hears the Parties, and makes his decision; it is in the nature of a parol award, it is binding and an Action will lie on it,(*e*) in which case the Plaintiff must prove the agreement, that such person should settle their disputes, and prove what his decision was, for which purpose the Referee himself is the best witness.

If Assumpsit is brought under an Award made under a parol reference, the Defendant may under the General Issue impeach the Award: but in the Evidence this distinction must be observed, that if the reference was such, that either Party might apply to the Court to set it aside, which is the case where Parties agree that it shall be made a Rule of Court; no Evidence is admissible at the Trial, of such matters which, if stated to the Court, would set the Award aside, such as misconduct in the Arbitration, want of notice, and the like; for the Party should have gone to the Court: but if he could have recourse to no such

(*e*) Cook *v.* Whorwood, 2 Saund. 337.

mode of redress, he may then under non-Assumpsit go into that Evidence; and proof of what would set the Award aside, will be good, and in every case, he may shew under that Issue, a legal objection to the validity of the Award. In settling the Evidence therefore for the Defendant it will be seen, what Evidence he may bring forward, and what is inadmissible.

3. *Of settling the Evidence in Actions of Assumpsit on Contracts of Sale.*

These Actions are,—1. For the price of the things sold, which is recovered under the Count for goods sold and delivered; or 2. To recover back the price paid for the thing sold, by reason of the defect of title in the Seller; or of Fraud in the Sale, as by a false warranty respecting it; which is Assumpsit for money had and received; or, 3. To recover special damages for the non-delivery of it.

1. The first of these Actions, as it falls under the head of Assumpsit for goods sold and delivered; how the Evidence as to it is to be settled, will be treated of under that general head hereafter.

2. The second of these heads is Assumpsit for money had and received. (*f*) This Action is maintainable where there has been any Fraud in the sale by the Seller, and the Buyer has paid his money as the price of the thing bought; he may in that case return the thing bought to the Seller, and declare for money had and received, and so in this Action recover back his money.

(*f*) 1 Esp. Dig. N. P. 13.

As if an Horse is sold, warranted sound, and he proves to be unsound ; or merchandise sold, warranted to be of a particular quality or description which turns out to be otherwise, and the Buyer has paid for them ; on returning the Horse, or the goods, the law gives him the remedy, by Assumpsit for money had and received, to recover back his money.

When the Action is so brought, the contract of Sale must be at an end or rescinded, and these facts must be proved at the Trial ; the Plaintiff must first prove the contract of Sale, and the price paid. 2. The warranty or representation of the thing sold given at the time of Sale.—3. That the warranty or representation so made was untrue, and falsify it by calling witnesses to prove it to be so: and, lastly, the Plaintiff must prove that the contract was rescinded in a reasonable time, (*g*) or at an end, that is, that he either returned the things sold or offered to do so, and that the Defendant either received them back, or refused to accept of them. (*h*)

Thus, in the case of Assumpsit, to recover back the price of an Horse warranted sound, the Plaintiff must prove the Sale, and that at the time of the Sale the Horse was warranted sound, and the price he paid: he should then call witnesses to prove that the Horse was unsound ; and, lastly, that he either returned him to the Defendant, or offered to do

(*g*) Compton *v.* Burn, MS. 1 Esp. Dig. N. P. 16. Adam *v.* Richards, 2 H. Black. 573.
(*h*) Towers *v.* Barrett, 1 T. Rep. 133.

so, and that the Defendant refused to accept of him. (*i*)

In these cases, the sale and warranty are matters of proof by witnesses, who were present at the time of the sale, at which time and at no other, the Evidence must prove the warranty to have been given : but these may also be proved by the *receipt for the price,* and also the warranty, as the receipt usually specifies the sum as paid " for an Horse *warranted sound,*" that receipt is received as sufficient Evidence of the warranty, as well as of the payment of the money by the Plaintiff to the Defendant ; (*k*) so that, on proving the Defendant's hand-writing to the receipt, the Plaintiff is only required further to prove the unsoundness of the Horse. The return or an offer to return him, and the Defendant's refusal to receive him, is proved by a witness.

It is also necessary to attend to the circumstances under which Sales take place ; *as Sales by sample or written contract ;* or *Sales by the intervention of a Factor or Broker :* as the evidence varies accordingly, and must be therefore attended to though the Declaration is general for goods sold.

When the Sale is by *sample,* (*l*) the bulk delivered must correspond with the sample, or the Sale is void, for it is a Fraud on the buyer. In every case of this description, the Plaintiff should be pre-

(*i*) Weston *v.* Downes, Dougl. 23.
(*k*) Skrine *v.* Elmore, 2 Campb. 407.
(*l*) Parkinson *v.* Lee, 2 East. 314.

pared to prove, that the sample sold by, was fairly taken from the bulk, and should have some to produce in Court to shew that they correspond. This may be done by the witness who drew the sample, and who can prove that he took it fairly. This Evidence is, however, not required unless the Defendant rests his defence on the ground, that the bulk did not correspond with the sample: otherwise the only Evidence which is required of the Plaintiff is of the general sale, price, and delivery of the goods; but such Evidence is to meet the Defendant's case, and is no part of his own.

If the Defendant sets up as a defence, that the sample differs from the bulk; he must produce the sample given at the time of the Sale, and prove it to be that which was so given. He should then produce part of the bulk delivered, and prove that it was fairly taken: he should then call witnesses who are judges of the article sold, who will state their opinion, as to their not being of the same quality or description; and if they are believed, the Plaintiff must fail. It is obvious, therefore, that where this defence is expected, the Plaintiff must be prepared to shew that they are the same, by similar Evidence of well informed witnesses to speak on their judgments, or of the Plaintiff's servants to prove that they were the same.

If the Sale is by *written contract*, (*i*) the delivery and description of the things sold must accurately

(*i*) Tye *v.* Fynmore, 3 Campb. 462.

correspond with the contract; nor will it be considered as an answer, to the goods delivered not agreeing with the contract, that the Plaintiff had a sample also after the contract made, and was satisfied with it.

When the Sale *is by the intervention of a Broker or Agent* by whom the bargain is made, he is a good witness for either side, and he should be called (*k*) to establish the terms of the Sale. The liability of the Defendant is proved as before.

When a Sale *takes place by Letter,* it is valid if thus proved, that is, that the Seller offered to the Buyer his goods at a certain sum specified, desiring the Buyer to signify his assent in the course of the post. If the Buyer does write, signifying his assent to the terms: this is a valid contract of Sale, and binds the Seller; and if he sells the goods to another, he is liable to an action. (*l*) Where the Action is brought by the Buyer, he must produce and prove the letter; prove it to be the hand-writing of the Seller, and prove his answer, and that it was given within the time required. For that purpose he should give notice to the Seller (the Defendant in the Action) to produce his Letter. If he does, it is conclusive to establish the Plaintiff's Case, if it appears to have been sent or received within the time required by the Seller's Letter: if it is not produced, the Plaintiff must then prove a copy by a witness who compared it with that de-

(*k*) Dixon *v.* Cooper, 3 Wils. 40.

(*l*) Adams *v.* Lindsell, 1 Barn. and Ald. 681.

livered to the Defendant, and it must be proved to have been put into the post in the course required by the Defendant. This time must be accurately proved, as the Plaintiff could not take an unlimited time to decide, or longer than the Defendant proposed.

If the Action is by the Seller against the Buyer for not accepting them, the Evidence is the same.

Another class of cases ranging under this head, are those of *Sales by Auction.* Assumpsit for money had and received being the proper form of Action to recover back a deposit made on such Sale, as on the Sale of an Estate for example, where it turns out, that the Seller had no title to the thing sold, or was not prepared to complete the purchase at the time specified in the particulars of Sale.

The Evidence required, in this case, has been before mentioned in page 75.

3. The third description of cases arising on Sales differs from the second in this, that that is *indebitatus assumpsit,* being to recover back money paid; this is Assumpsit *generally;* and the Plaintiff seeks in the latter Action to recover special damage, by reason of the Defendant not performing his contract of Sale, and what damage he complains of must be laid in the Declaration. Thus, for example, in the last case, of the Sale of an Estate by Auction, if the Plaintiff declares in *indebitatus assumpsit* for money had and

received, he can recover but his deposit only; (*m*) but if he declares in Assumpsit on the contract of Sale made by the Defendant, by which he was declared the Best Bidder at the Auction, and in consequence paid his deposit, pursuant to the particulars, he may go, after assigning the breach of performance by the Defendant, for special damage, such as that he was put to great expense in examining the title: in journeys undertaken on account of the Estate, and for the interest of the money; (*n*) and then having proved the several matters stated in that case, (pag. 75) he may go into Evidençe of these facts of special damage distinctly, and he can recover damages accordingly, (*o*) but they must be stated in the Declaration, to which in settling the Evidence the Proofs should be confined.

4. *Of settling the Evidence in Actions on Wagers.*

Assumpsit lies to recover a *Wager* fairly won, either against the loser or against the stakeholders. If the Action is against the loser, the Plaintiff must distinctly prove the terms of the wager; which may be done, either by a writing containing them, or by a witness who heard it laid, and then prove that he had won it. If it is against the stakeholder, he must prove the payment of the Stakes into his hand; that he was informed of the terms of the wager; that the Plaintiff won; that the stakeholder was informed of it, and the stakes regularly demanded.

(*m*) Burrough *v.* Skinner, 5 Burr. 2639. Flureau. *v.* Thornhill, 2 Black. Rep. 1078.

(*n*) Richards *v.* Barton, 1 Esp. N. P. C. 268.

(*o*) Camfield *v.* Gilbert, 4 Esp. N. P. C. 221.

If the subject of the wager appears to be illegal, such as on a fight or on a horse race, for less than 50*l.*; (*p*) or on an indecent or improper subject, as on the sex of a particular Person ;(*q*) on a matter of public policy which ought not to be discussed, as on the amount of certain taxes ; (*r*) no Action can be supported; and the Defendant is not called on to produce any Evidence. The Plaintiff must be nonsuited.

But though the wager may be recoverable in the terms of it, the Defendant may give in Evidence that he was cheated or deceived into it; that he could not win, as, *e. g.* that he laid the wager on an event which had actually happened, and which was known to the Plaintiff at the time. This is matter of proof by witnesses ; and is an answer to the Action.

If the Action is against the Stakeholder, it is either by the winner for the whole deposit, or by the loser to recover his own back, on the ground of the wager being illegal ; as to which the Rule is, that though the wager was illegal, if the stakeholder paid it over to the winner without notice, he is subject to no Action ; but if he was required by the Loser not to do so, and he does, the money is recoverable against him. (s)

(*p*) Johnson *v.* Bann, 4 T. R. 1. Whaley *v.* Pajot, 2 B. and P. 51.

(*q*) Da Costa *v.* Jones, Cowp. 729.

(*r*) 1 Esp. Dig. N. P. 26 to 29.

(*s*) Atherfold *v.* Beard, 2 T. Rep. 610. Allen *v.* Hearn, 1 T. Rep. 55. Cotton *v.* Thurland, 5 T. Rep. 405. Howson *v.* Hancock, 8 T. Rep. 575. Eltham *v.* Kingsman, 1 Barn. and Ald. 683. Aubert *v.* Walsh, 3 Taunt. 277.

5. *Of settling the Evidence under the common Counts in Assumpsit.*

I shall now consider the rules to be observed in the settling of Evidence on the common Counts of Assumpsit as far as it respects general principles, the particular cases which occur being too numerous to find a place here: but it will be here necessary to state a few of them by way of example, to point out how Evidence is to be settled in similar instances. These Counts in Assumpsit are,—1. For money had and received.—2. For money lent and advanced.—3. For money paid to the Defendant's use.—4. For work and labour.—5. For goods sold and delivered. And, lastly, on an Account stated.

1. *Of the Evidence on the Count in Assumpsit for money had and received.*

This is a very general head, and lies in every case in which a person has received or obtained possession of the money of others, which he has retained or not paid over, and which he has no legal title to keep: the cases arising under it must be therefore as various as are human transactions, connected with the receipt or payment of money. The general rule, therefore, as to settling the Evidence, to enable the Plaintiff to recover on this Count is, that he must give the whole transaction in Evidence; that is, he must prove the circumstances under which the Defendant received or got possession of the money, the amount, and then prove that he has no right to keep it, but that it belongs to the Plaintiff who ought to receive it. I shall exemplify this general position by cases which range under the different grounds of this

head of Assumpsit, which require no Evidence of any promise on the Defendant's part to pay, but are founded on equitable claims on the Plaintiff's part, which the law raises in his favour.

1. The Plaintiff may under this Count recover money paid to the Defendant, (*a*) where *the consideration for which he paid it has failed*, and for which the Defendant received it. (*b*) Thus, where money was paid by the Plaintiff to the Defendant as the price of an Annuity granted to him by the Defendant, and the latter set the annuity aside, the Plaintiff recovered back the money; for it was unjust that the Defendant should keep the money paid for the Annuity, when it had been set aside by himself. (*b*)

In such a case, it would be necessary for the Plaintiff to produce and prove the execution of the Annuity Deed by the Defendant to him, by calling the subscribing witness. The payment to the Defendant (*c*) of the consideration would be also necessary to be proved: but that would appear by the consideration being recited in the Deed and the Receipt indorsed, to which the Defendant's handwriting should be proved. It would then be necessary to prove, that the Annuity was set aside by the Court; and the Rule obtained by the Defendant for that purpose should be produced, and Evidence given that it was obtained by him: this may be done by producing an Office copy of the Rule

(*a*) 1 Esp. Dig. N. P. 2.

(*b*) Shove *v.* Webb, 1 T. Rep. 732. Scurfield *v.* Gowland, 6 East. 241.

(*c*) Stratton *v.* Rastall, 2 T. Rep. 366.

obtained, and the Affidavit on which it was obtained. It will appear, by the Rule being made absolute for setting it aside, that the Plaintiff could not recover any future arrears of the Annuity for which he had paid his money, and that Defendant therefore could have no title to keep it.

In settling the Evidence therefore, where the cause of Action arises from the consideration having failed on which the Plaintiff paid his money, the consideration must be proved; and in doing so, it must be observed, that if it was founded on any written contract or agreement, the writing must be produced and proved: if it was by parol only, it may be proved by a witness.

Thus, *e. g.* if the Plaintiff had paid to the Defendant a sum of money in the presence of a witness, in consideration of the Defendant's resigning to him a certain Place or Office, but which it was found afterwards the Defendant would not be permitted to resign, or had no right to sell; the Plaintiff may recover his money back by calling the witness to the transaction, and shewing that the Defendant had not put him into the possession of the Place for which he had paid his money, or that the Office could not be legally sold.

But if the transaction arose on matter wherein there was *any written Instrument* connected with it, that Instrument must be produced.

As if the Plaintiff had discounted a Navy or other

Bill for the Defendant, which turned out to be forged, and he brings his Action to recover the amount paid, (*f*) he cannot recover by giving parol Evidence, that there was such a transaction, without producing the Bill, or at least shewing that it has been lost. The course of Evidence therefore for the Plaintiff in that case, or in similar ones, necessarily is this: to produce the Bill; to prove that he received it from the Defendant for whom he discounted it, and that he paid him on that account £ —. He must then prove that the Bill is forged, by calling witnesses who are acquainted with the character or hand subscribed to the Bill, or from some mark on the Bill which enables them to swear that it is forged. If it is a private person's Bill, persons acquainted with his character and handwriting must be called. If it is a public doçument, it is proved to be a forgery, by calling a Clerk from that Office from whence the Instrument or Bill purports to have issued, whose business it is, to be acquainted with the signature of those whose department it is to sign such Instruments or Bills, or who are acquainted with the private marks affixed to them, which enables them to detect forgeries.

2. If a person has paid money to another *by mistake*: on discovering the error, he may recover it back under the Count for money had and received.(*g*)

But the mistake must be a mistake of the fact, not of the law; for if a man believing that another has a

(*f*) Jones *v.* Ryde, 5 Taunt. 488.
(*g*) 1 Esp. Dig. N. P. 2.

right by law to any money, with full knowledge of all the facts pay it to him, and afterwards discovers that the Party was not legally entitled to it; he cannot recover it back; as where the Captain of a King's Ship which had brought home treasure from abroad, for which he is allowed freight, and believing that the Admiral was entitled to a share, paid him a third; but discovering afterwards that the Admiral was not so entitled, brought his Action to recover it back, it was held not to lie. (*h*)

Where the Action is brought to recover money so paid, (*i*) the Plaintiff must go into Evidence of the whole transaction, and the circumstances under which he paid it; and it must be clearly made out that the payment was made in consequence of the Plaintiff supposing something to have taken place, or some fact to have happened, which turns out to be otherwise than he supposed; as if an underwriter supposing a Ship to be lost, on which he had underwritten a Policy, has paid as for a total loss, and she afterwards returns to Port; he has a right to recover back his money, he having paid it under a belief that the Ship had been lost. (*k*)

In this case, as in the preceding one, where the demand is connected with any Instrument or Writing, it must be produced: it would therefore, in that case, be necessary for the Plaintiff to produce the

(*h*) Brisbane *v.* Dacres, 5 Taunt. 143.

(*i*) De Hahn *v.* Hartley, 1 T. Rep. 343. Cox *v.* Prentice, 3 Maule and Selw. 344.

(*k*) Moses *v.* M'Ferlane, 2 Burr. 1010. Bilbie *v.* Lumley, 2 East. 469. Gomery *v.* Bond, 3 M. and S. 378.

Policy to prove the adjustment of it, and the payment by him made thereon, as settled for a loss by perils of the Sea, and that he paid the amount to the Defendant.

The other grounds of Action, on this Count, will be found at length in all treatises on the laws of Nisi Prius. (*l*) It lies to recover back money extorted or obtained by oppression; (*m*) paid to a person acting under a void authority; (*n*) money embezzled (*o*) or obtained by cheating, or given to be applied to an illegal purpose: in all these cases, the rules just laid down in the two instances given are in every respect applicable; that is, the whole transaction must be proved; and if it has arisen from the intervention of any Instrument in writing, *it* must be produced and proved, as no parol Evidence of it can in such case be admitted.

The Defendant to this Action for money had and received may prove,—1. That the money was paid to him for a particular purpose, and that he had so applied it; (*p*) this may be proved by the Person to whom it was so paid. 2. That he received it as concerned with the Plaintiff in an illegal transaction, as where the money was received for illegal Insurances in the Lottery, in which the Plaintiff and Defendant

(*l*) Esp. Dig. N. P. 3. *et ultra.*

(*m*) Smith *v.* Bromley, Dougl. 671. Cockshott *v.* Bennet, 2 T. Rep. 763. Astley *v.* Reynolds, 2 Stra. 915.

(*n*) Robson *v.* Eaton, 1 T. Rep. 59.

(*o*) Clark *v.* Shee, Cowp. 197.

(*p*) Horsfall *v.* Handley, 8 Taunt. 137.

were jointly concerned. (*q*) Or, 3. That it was a voluntary payment by the Plaintiff to him: for (*r*) it must appear that the Plaintiff did not pay to the Defendant the money *voluntarily*, but in consequence of error and mistake, as if a sum of money is claimed from any Person, which he in fact does not owe, but influenced by some consideration pays it, though he might have resisted the payment with effect, he cannot, after so voluntarily paying it, recover it back, for that would tend to the circuity of Actions. (*s*)

2. *Of settling the Evidence on the general Count for money paid, laid out and expended to Defendant's use.*

The next head of Evidence respects this head, as to which the general rule just laid down with equal force applies; that no man can, of his own head, pay money on the account of another, so as to make it a ground of Action, *unless it has been paid at his request; by his direction; or is money which he is compellable by law to pay on Defendant's account by* reason of some legal proceedings, or some legal claim or demand, which he could not resist.

It will therefore not entitle the Plaintiff to recover in this Action, to prove generally a payment made by him on account of the Defendant; or that he paid a

(*q*) Booth *v.* Hodgson, 6 T. Rep. 405. Browning *v.* Morris, Cowp. 790.

(*r*) 1 Esp. Dig. N. P. 119. Brown *v.* M'Kinnally, 1 Esp. N. P. C. 279. 7 East. 269.

(*s*) Brown *v.* M'Kinnaly, 1 Esp. N. P. C. 279. Marriott *v.* Hampton, 7 T. Rep. 269.

debt which the Defendant clearly owed, and was liable to: he must go further, and shew *a request or order by the Defendant to do so;* which may be done, either by a witness, or by writing, for no man can make himself the creditor of another, without his consent.

Or he may give in Evidence, that he was *compelled by law to pay it,* he being liable on the Defendant's account, whose debt it was.

As where an under Tenant's goods were distrained on account of Rent due by the Defendant to whom he was Tenant, to the head Landlord, and to redeem his goods, he paid the Rent in arrear; on proving the distress made, the taking of his goods, that it was for Rent due by the Defendant, and that he to redéem his goods paid the Rent due by the Defendant; all of which may be proved by the head Landlord, to whom the Rent was paid, or the Broker he has employed; the Plaintiff may recover the whole money so paid. (*t*)

Under this head falls the case of payment of money by *Sureties* for their Principal, as under Bonds or Recognizances. (*u*) A surety, who pays the whole sum for which he was jointly bound, may recover the whole against the principal, or a proportionate part from his co-security.

This head is more fully treated of *post,*

(*t*) Exall *v.* Partridge, 8 T. Rep. 308.
(*u*) Per Buller, Just. in Toussaint *v.* Martinnant, 2 T. Rep. 105

3. *Of the Evidence on the Count for money lent.*

It is necessary to observe on this Count, that the mere proof of the Defendant having received a sum of money from the Plaintiff will not support it; the money must be proved to have been advanced to him *as a loan;* for otherwise it is open to the presumption, that it was given for some other purpose. This is proveable either by a witness or by letter or other writing, or by a Promissory Note ; and an unstamped slip of Paper with "I. O. U. £ —," has been held good Evidence of money lent ; (*x*) all of which are good Evidence under this Count on proving Defendant's hand-writing. So the Plaintiff may prove a loan of monies to the Defendant by production of his check on his Bankers, payable to the Defendant, and paid by the Bankers, if it is proved to have been paid to him, or if it has the Defendant's name indorsed on it, but not otherwise, as the use of a name in the body of the check is quite arbitrary, but the indorsement of the Defendant establishes his receipt of the money, and his hand-writing must be proved. (*y*)

If the Defendant is sued for money lent or advanced to a third person on his supposed credit or guarantee, the Plaintiff must have the Defendant's note in writing to give in Evidence in the manner stated, as to the clause in the statute of Frauds. (*z*)

(*x*) Childers *v.* Boulnoir, Dowl. and R. N. P. Rep. 8. And vide Israel *v.* Israel, 1 Camp. 499. and Fisher *v.* Leslie, 1 Esp. N. P. C. 426.

(*y*) Egg *v.* Barnett, 3 Esp. N. P. C. 196.

(*z*) *Ante*, 66.

No parol Evidence can charge him for the debt of another. (*a*)

4. *Of settling the Evidence on the Count for goods sold and delivered, or goods bargained and sold.*

To support this Count, the Plaintiff must shew a valid sale, where an actual delivery has not taken place, that is, such a sale as can legally be enforced under the statute of Frauds, 29 Car. 2. c. 4. If the goods for which the Action is brought, are under the value of 10*l.*, the contract may be proved by parol: but if they exceed that sum, the Plaintiff must have either a note in writing specifying the bargain, signed by the Parties or their Agents, in which case he must prove the hand-writing of the Defendant, or if signed by an Agent, that he was the Defendant's agent, and prove his hand-writing: or he must prove that he gave the Defendant something in earnest or in part payment, to bind the bargain; or he must prove a delivery by him, and an acceptance by the Defendant of part of the goods so sold. The two last cases may be proved by witnesses: unless therefore the Plaintiff is prepared with evidence to the effect above stated, he cannot go to Trial. (*b*) But although delivery of the goods has taken place, yet the proof of the mere delivery of Goods to the Defendant by the Plaintiff is not sufficient, without Evidence of a contract of Sale. To support this, however, the Plain-

(*a*) 1 Esp. Dig. N. P. 123. Birkmyr *v.* Darnell, 1 Salk. 27. Williams *v.* Leper, 3 Burr. 1886. Castling *v.* Aubert, 2 East. 325.

(*b*) Vid. Baldey *v.* Parker, 3 Dowl. and Ry. 220. Howe *v.* Palmer, 3 B. and A. 321. Tempest *v.* Fitzgerald, 3 B. and Ald. 680.

tiff is not called upon to prove an actual bargain for the specific goods for which the Action is brought; it will be sufficient to prove a dealing in the way of the trade or business of the parties: as if a Factor delivers goods to a Defendant in which he deals as a merchant or shopkeeper, although a reasonable presumption is thereby raised, that they were sold to him, and that he was liable; still the Evidence must go something further, and shew, that the Defendant knew of or adopted the delivery, and evidence to that effect is sufficient: but if there is no such connection in their dealing; the Plaintiff must shew an order or contract for them, as well as a delivery of them to the Defendant.

This is matter of Evidence as to the contract or order, and may be proved either by writing or parol; the fact of the delivery must be proved by witnesses, and the value of the goods delivered, by similar proof.

As it is essential, where the Declaration is for goods sold and delivered. to prove the delivery of the thing sold to the Buyer, (*c*) these points of Evidence are to be attended to:—1. A delivery to the Buyer himself, or at his own house, is in all cases sufficient. 2. A delivery according to his order is good, if the order is produced, proved to be his, and that the delivery of the goods was pursuant to it: as if the order was that they should be sent by a particular Stage coach or Waggon, or left at a particular place, it is sufficient, to prove a delivery according to the

(*c*) 1 Esp. Dig. N. P. 18.

order. (*d*)—3. Where the Buyer and Seller live at a distance, and the former orders goods generally, to be forwarded to him, it is implied that they are to be sent by the usual conveyance or carrier known to be so employed; and the proof of the delivery of the goods to him, and that he is the regular and usual carrier, is sufficient to charge the Buyer. (*e*)

What has been now stated with respect to the Evidence of goods sold and delivered applies to cases of the sale and delivery of goods to the Defendant himself: but it is necessary also to attend to the Evidence where the goods are not delivered to the Defendant himself, nor for his use, but to third persons on his supposed credit, which is in the nature of a guarantee. If the goods were delivered to such person, and the Defendant said "If he does not pay you, I will," and such person does not pay, the Defendant will not be liable in any case, unless he has given a note in writing to that effect. This is by the statute of Frauds, 29 Car. 2. c. 3. which enacts, "That no person shall be charged to answer for the debt, default, or miscarriage of another, unless the agreement upon which the Action shall be brought, or some memorandum or note of the contract, agreement, or undertaking be in writing, signed by the Parties or their Agents, properly authorised." In settling the Evidence, therefore, where goods have been sold and delivered to another, on the collateral promise or guarantee of the Defendant, the Plaintiff must have such note to give in Evidence; and

(*d*) Vale *v.* Bayle, Cowp. 294.

(*e*) Dutton *v.* Solomonson, 3 Bos. and P. 582. Brown *v.* Hodgson, 2 Campb. 36. King *v.* Meredith, 2 Camp. 639. Copeland *v.* Lewis, 2 Stark. 33.

he must prove the hand-writing of the Defendant subscribed to it, or if signed by an Agent, first prove the agency of the Party, and then his hand-writing: but the Agent himself may be called to prove it.

This being a general head, it may be proper to advert to some particular heads of Evidence usually brought forward in this Action for goods sold and delivered.

1. First that a man's own book or entries of goods sold are inadmissible as Evidence for him of themselves: but the clerk or person who made the entries may refer to the Book to refresh his memory. (*f*) But they may be used as Evidence against him.

2. A Factor who has sold the goods of the Plaintiff to the Defendant, is an admissible witness to prove the sale and price. (*g*)

Of the Evidence for the Defendant under the Action for goods sold and delivered.

The Defendant may, in answer to the Plaintiff's Action, shew that the Goods were sold on credit, and that the Action was brought before the credit expired. (*h*) The time of the delivery, being proved by the Plaintiff; and to prove the commencement of the Action where he relies on this defence, he should have an examined copy of the writ, or the copy served on

(*f*) 1 Esp. Dig. N. P. 174. Cooper *v.* Marsden, 1 Esp. N. P. C. 1. Ld. Raym. 745.

(*g*) Dixon *v.* Cooper, 3 Wils. 40. *Ante*, 83.

(*h*) Price *v.* Nixon, 5 Taunt. 338. Mussen *v.* Price, 4 East. 147.

himself, or the writ itself to give in Evidence: but if the suit was commenced by Bill, if the credit expired before the Plaintiff filed or delivered his Declaration, though subsequent to the suing out of the writ, it will be sufficient to entitle the Plaintiff to recover, to prove the delivery of the goods at any time previous to the filing or delivering his Declaration, (*i*) for *that* in suits by Bill, is deemed the commencement of the Action.

The extent of credit to which a Defendant, as a Buyer of goods, is entitled, is either an implied or express credit. In almost every trade, as between the Buyer and Seller, there is a certain period of credit, to which the Buyer is entitled as a matter of course, though nothing is said about it at the time of the sale. Where the Defendant relies upon this, he must call persons well acquainted with the course of the trade, who can speak to what extent it is usually agreed to be given and acted upon, and to state that it is an established usage. An express credit is proved either by Letter, or the Evidence of some witness who heard the contract made.

So the Defendant may give in Evidence, that the goods were not such as he had ordered, and that he offered to return them: that they were of inferior value to what they are charged: that they were damaged or worth nothing. This is matter of fact to be proved by witnesses.

As the sale of goods is often effected through the medium of Letters, expressing the terms of the sale,

(*i*) Foster *v.* Bonner, Cowp. 454. Best *v.* Wilding, 7 T. Rep. 4.

the price, and the circumstances of the delivery, and they require a stamp in some cases, and in others not; if any Letter is to be given in Evidence under this Count, (refer to *ante*, page 65.) and the same where the sale is by a memorandum or written agreement.

5. *Of the Evidence on the Count for Work and Labour.*

In this case it has been laid down, that what is done by any one, in the course of his profession, trade, or business, is presumed to be done with a view to payment, and that the person doing it may recover an adequate compensation or reward: in such case it will be sufficient for the Plaintiff to shew, that he was so employed, without proving any express promise to pay him. There must be however some Evidence to implicate the Defendant, and connect him with the demand, such as, *e. g.* if the Action was for building an house, it should be shewn that he was seen on the premises giving orders or directions, or doing something connected with the work: (*l*) but where what is done has no connection with the Party's business, an express employment must be proved on the terms of being paid, the law being clear that no man can make another his debtor without his consent, and that no man shall seek for payment for what he at first gratuitously undertook and without the view of being paid for it.

In settling the Evidence therefore on this Count where the work or labour done is connected with the

(*l*) *Vide post.* Hopkinson *v.* Smith.

Plaintiff's trade, profession, or business, he must prove of what trade, profession, or business he is, and that the Defendant either expressly retained or employed him in it: or that he was heard to say, that the work was for him: or was known to give orders or directions concerning it: and then prove the work and labour done, that it was done in a fit and proper manner, and then give Evidence of the amount of what he charges for it.

If it is not so connected with the Plaintiff's trade, profession, or business, he must prove that the Plaintiff retained, hired, or employed him to do it, and that he did it in consequence under a contract or agreement to pay him, which may be proved by a witness or by a writing in the Defendant's hand.

And the Plaintiff must, lastly, where no express agreement is proved or remuneration promised, prove what he deserves to have for his trouble. All these facts are proveable by witnesses.

Under this Count, *Attornies* sue for and recover their Bills. To enable an Attorney to recover against a person by whom he has been employed, he must prove the retainer and business done, and the fairness of his charges: but beside that, he must in every respect giveEvidence to the following matters, as they are directed by stat. 2 Geo. 2. ch. 23. He must first shew that he delivered his Bill a month before Action brought. This is usually done by his Clerk who has copied it, and served a copy on the Defendant, which he should have notice to produce, though not abso-

lutely necessary, as a counterpart kept by him is sufficient Evidence. (*m*) The copy produced in Evidence should be verified, from having been compared with that delivered to the Defendant. 2. He must shew the time of the delivery of it: that is best done, by the witness who delivered the Bill to the Defendant indorsing on the back of the copy he kept, the day of delivering it; and as it must be delivered a month before an Action can be supported on it, the commencement of the Action may be shewn either by the writ, or by the *Nisi Prius* Roll. 3. He must shew, that it was delivered either to the Defendant in person, or left at the Defendant's dwelling house; (at his counting house will not be sufficient;) and that it was *left* there, this the same witness can prove. If the business was done for many, the delivery of the Bill to one is good. 4. The business which is charged for in the Bill, must be proved to have been done; this is proved by the Plaintiff's Clerk, or any witness who knows of its having been done. 5. The propriety of the charges is established by the testimony of some member of the profession of an Attorney. The object of the statute in requiring the Bill to be left for a month with the client, being to have it taxed, if the Defendant wished it, if the Bill is not for business done in the Courts, and which is the subject of taxation, proof of the delivery of any Bill is unnecessary in those cases. The items of the Bill will shew the nature of the employment.

It is indispensable, as the first step in the Evidence where the Attorney sues for his Bill, to prove the retainer; that may be done, by what it is always prudent

(*m*) Anderson *v.* May, 2 B. and P. 237.

for the Attorney to do, to have the authority in writing of his client if Plaintiff, to bring the Action, or if Defendant, to defend it: in which case proof of his handwriting only is necessary. He may also prove it by letters from him, or by a witness who was present, or at a subsequent time heard him give instructions about the cause. He may, lastly, prove it, by the production of a Judge's order to have his Bill taxed, and prove the Defendant's, undertaking to pay amount, signed by the Defendant or his Attorney in the Judge's Book, as is the practice. (*n*)

Of the Evidence on the part of the Defendant on this Count.

The Evidence which the Defendant may adduce to meet the claim arising from this Count (*o*) is, that what was done was done gratuitously, out of kindness, or with a view to a legacy or future service which the Defendant might render to the Plaintiff; this Evidence is an answer to it. (*p*) So the Defendant may reduce the demand by counter-Evidence of over charge by the Plaintiff, by shewing what the Plaintiff was fairly entitled to. In settling therefore the Evidence on this point, the Defendant may set up the defence, that what the Plaintiff did was ill done, in an unworkmanlike manner, or did not answer the purposes for which it was intended; all which matters are admissible in Evidence to be proved by persons of competent skill. If what has been done by the Plaintiff has been of no use or value to the Defendant, it is a good defence to

(*n*) Ley *v.* Jones, 2 Camp. 496.
(*o*) Hiccox *v.* Proud, 1 Esp. Dig. N. P. 108.
(*p*) Osborn *v.* Governors of Guy's Hospital, 2 Stra. 728.

the Action : but if the Defendant has derived any benefit from it, the Plaintiff shall recover *pro tanto.*(q)

If a servant hired for a year brings an Action for his wages against his Master, the latter may give in Evidence, that he had turned him away for disobedience of his orders; for in such case the servant cannot recover even for the time he served: (r) but if the Defendant relies on this defence, he must shew what the orders were which the Plaintiff refused to execute, and shew that they were to do something, which it was the duty of his station to do. These facts may be proved by witnesses, letters, or the Defendant's admission.

6. *Of settling the Evidence on the Count on an Account stated.*

This does not suppose a regular statement of demands between the Plaintiff and the Defendant, and a balance struck in the Plaintiff's favour: any Evidence of an admitted balance, where there have been mutual demands, either by parol or by writing, is quite sufficient to enable the Plaintiff to recover, though different from the sum stated in the Declaration.

This is, however, to be taken to be the case where the Plaintiff's case is on the common Count in the general form, *viz.* " that the Plaintiff and Defendant

(q) Basten *v.* Butter, 7 East. 479, 485.
(r) Spain *v.* Arnott, 2 Stark. 256.

accounted together, and the Defendant was then found in arrear, and indebted to the Plaintiff in a large sum of money, *to wit,* the sum of £——," where the sum is laid under a *videlicet:* but if the Count was on an account stated between the Parties, wherein the Defendant was found in arrear, and indebted to the Plaintiff in the sum of £20. *e. g.* (*s*) and then state a promise to pay in consideration of forbearance, the exact sum must be proved, or the Plaintiff will be nonsuited. In settling the Evidence, therefore, this distinction is necessary to be attended to.

3. I shall now proceed to the third head of this Chapter; and consider the Evidence in cases of Assumpsit, connected with the *Person;* as standing in some degree of relation to others, or in a representative character; and how the Evidence in those cases is to be settled.

1. *Of settling the Evidence in the case of Sureties, Co-Bail, or Co-Defendants in an Action.*

If a Surety or Co-Bail is compelled to pay the whole Debt for which he became bound with another, he may call on the Principal to repay him the *whole* or for *contribution from his Co-Surety or Co-Bail;* that is, if two only were joined in that security, for a moiety of the sum paid; if three, for a third each; and so in proportion where there are more joined. (*t*)

(*s*) Arnfield *v.* Bate, 3 M. and S. 173.

(*t*) 1 Esp. Dig. N. P. 5. Per Buller J. in Toussaint *v.* Martinnant, 2 T. R. 105.

To entitle the surety however to maintain this action against his Co-Surety, he must have *paid the money* to the Creditor to whom they were bound, and that fact must be proved at the Trial; the *giving him security* for the whole debt, which he has accepted, will not entitle him to maintain Assumpsit against the other; for there is no money actually paid, which is necessary to support the Action. (*u*)

In such action, the form of which is Assumpsit for money paid to the Defendant's use, the Plaintiff must give in Evidence the original security by which he became bound with the Defendant; if by Bond, it must be produced and proved to have been executed by the Defendant and himself, by the subscribing witness; and if by Recognizance, it must be produced and proved. When the Bond or other Security is so proved, and it is read in Court, the sum in which the Parties were bound appears: the Plaintiff must then prove that he was called upon by the obligee of the Bond, or the Plaintiff or Sheriff, in the case of a Bail Bond or Recognizance, and compelled to pay the whole Debt, which it is observed in the case just cited must be in money, not by giving a security. For this purpose, he must shew, that payment was either demanded of him or enforced; which may be done by giving either parol or written Evidence of the *demand* made on him, in consequence of which he paid; where he has been called upon, it is always advisable to give notice to the Principal, or his Co-Surety, or his Co-Bail in the

(*u*) Maxwell *v.* Jameson, 2 Barn. and Ald. 51.

first instance, either to pay or resist the demand, and he should be prepared with Evidence of his having done so: but though advisable, it is not necessarily required in order to give him a title to recover. In this case, the obligee of the Bond or Plaintiff in the Action on the Bail Bond are good witnesses to prove his payment of the whole sum in which he was bound with Defendant.

If two are *Joint-Defendants* in an Action of Assumpsit, in which the Plaintiff has had a Verdict, and the whole sum recovered has been paid by or levied against one, he may recover the moiety in an Action for money paid, against the other. In settling the Evidence in that Action, the Postea with the Master's allocatur, is Evidence of the amount of the Damages, and the nature of the Action will appear from the Record: but the Postea is not Evidence as to the costs. To prove this, the office copy of the final judgment is better Evidence as it will prove the whole amount, which the Plaintiff was forced to pay, and so will entitle him to recover a moiety. (*x*)

2. *Of settling the Evidence in cases of Landlord and Tenant.*

The principal cases in Assumpsit, under this head, in addition to that for Use and Occupation already treated of, are,—1. Such as arise on the Covenants of an expired Lease, or,—2. For not using the Land in an Husbandlike or Tenantlike manner.

(*x*) Foster *v.* Compton, 2 Stark. 364.

1. Where there has been a Lease containing Covenants of any description, which has expired, and the Tenant continues to hold as before, he holds subject to all the Covenants contained in the Lease. During the continuance of the Lease, the Plaintiff must declare in Covenant: but when it is expired, and the Tenant continues to hold over, the Law raises an Assumpsit that he shall continue to hold, on the same terms as were the subjects of the Covenants in the Lease, while it existed. For any breach of these, the Lessor is entitled to recover by a special Action of Assumpsit, stating in the Declaration, the breaches, in the words of the Covenants in the original Lease. (*y*)

In such case, the Plaintiff must produce and prove the execution by the Defendant of the original Lease, by calling the subscribing witness; the term being mentioned in it, it will appear by the date, that it is expired, and the Covenants on which breaches are assigned should be read from it: the Defendant must be proved to have held and enjoyed the Premises under the original Lease, and to have continued in possession after it was expired. The Plaintiff must then call witnesses to prove the breaches assigned, and the extent of the injury as damages; as, for example, if it was for not repairing, by a witness who proves the state of the Premises, and what sum it would take to put them into repair.

If the Action is against the Tenant for *not using the Land in an Husbandlike way*, that is matter of

(*y*) 1 Esp. Dig. N. P. 7.

Evidence governed by the custom of the country where the Land lies, and what is there deemed good Husbandry: (*z*) for this purpose, the Plaintiff must prove, that the Defendant was his Tenant, and call witnesses to prove in what manner he has treated the Land while he occupied it. He must then call persons of skill and experience, who are to speak to what is good Husbandry, and whether what the Defendant has done is contrary to it; and, lastly, prove the extent of the damage.

What is meant by good Husbandry, according to the *custom of the country,* "means using the Land according to the prevalent course of good *Husbandry in the neighbourhood,*" and therefore is to be proved by calling Farmers or Tenants of the adjoining Farms: as if the course of tillage in the neighbourhood was to leave one half of the arable Land fallow every year, and the Defendant left a third only, that would be sufficient to support the breach assigned, "of not using the Land in an Husbandlike way according to the custom of the country." (*a*)

3. Of settling Evidence for the Plaintiff in the cases of Persons connected with the Church or Ecclesiastical demands; such as Parsons or Vicars, Curates, Churchwardens, or other Officers.

1. *Of Parsons or Vicars.*

(*z*) 1 Esp. Dig. N. P. 303. Powley *v.* Walker, 5 T. Rep. 373. Legh *v.* Hewitt, 4 East. 154.

(*a*) Legh *v.* Hewitt, 4 East. 154.

These Actions are,—1. For dilapidations, which a Rector or Vicar on coming to a Living is entitled to recover from the former Incumbent if living, in whose time the dilapidation took place; or from his Representatives, if he is dead. (*b*)

In support of this Action, the Plaintiff must prove his title to the Living, by giving in Evidence his presentation, institution, and induction into it: but to fix the Defendant as late Incumbent, or his Representative as liable for the dilapidations, it is only required to shew his acts; such as receiving the Tithes: living in the Parsonage House; and doing the duty as Parson or Vicar. (*c*) The Plaintiff must then prove the state of the Premises, that they belong to the Living or Parish, and are dilapidated and out of repair; and, lastly, the amount of the damages.

2. For subtraction of Tithes, upon which, however, it should be observed, that the form of Action is not Assumpsit, but Debt under stat. 2 and 3 Ed. 6. ch. 13. (*d*)

Where the Parishioners, one of whom is the Defendant, have recognised the Plaintiff as their Parson or Vicar by paying him Tithes on any occasion, (*e*) if he is afterwards obliged to sue them for subtraction of Tithes, Evidence of such former payment or set-

(*b*) Jones *v.* Hill, 3 Lev. 268. Radcliff *v.* D'Oyley, 2 T. Rep. 630. Young *v.* Munby, 4 M. and S. 183.

(*c*) Radcliff *v.* D'Oyley, 2 T. Rep. 634.

(*d*) *Vid.* Strode *v.* Byrt, 4 Mod. 422. Berryman *v.* Wise, 4 T. Rep. 367.

(*e*) Per Lord Kenyon, in Radford *v.* M'Intosh, 3 T. Rep. 635.

tlement, is sufficient Evidence of his title to them. But it should seem that if a new Incumbent, who has never received Tithes nor any dues in that character, is obliged to sue for subtraction of Tithes, he must prove himself to be the regular Incumbent of the Living, by the same Evidence as is above stated.

Having established his title by such Evidence to the Tithes, the Plaintiff must then prove the Defendant to be in possession of the Lands, for the subtraction of the Tithes of which the Action is brought: that they lie within the Parish: that there was a crop grown on them of Corn or Hay, or the like, which was cut and carried by the Defendant without the setting out or leaving of any Tithes; and he, lastly, must prove the single value of those carried away; which being established, he will be entitled to a verdict for the triple value; all this is to be proved by the *vivâ voce* Evidence of Persons acquainted with the Parish, and the land held by the Defendant.

Where there is a Vicarage, it often becomes a question, what are great and what small Tithes, to establish what the Vicar is entitled to, depends on the endowment of the Vicarage. That is kept in the Augmentation Office, from whence the original or a copy may be had, to give in Evidence: but it should seem to be sufficient for the Party to shew, that particular tithes have always within the time of memory, been paid to the Parson or Vicar. And this may be done by calling old witnesses, who know the parish.

The Evidence for the *Defendant,* in this case,

may be to *shew* that there was a modus existing in the Parish of a money payment in lieu of Tithes, which warranted him to remove the whole of the crop; which may be proved as in the last case, by ancient witnesses.

3. An Action of Assumpsit will lie by one who has been the *Curate* of a Parish, against the Incumbent who gave him a title to be ordained, though he has been dismissed by that Incumbent from doing the duties of the Church. (*f*)

The Evidence for the Plaintiff in that case is the letter of recommendation of the Plaintiff in the common form, addressed to the Bishop by the Incumbent; this is proved by the production of the letter itself by the Officer of the Bishop, and proving the hand-writing of the Defendant subscribed to it. It will then be necessary to prove that the Defendant is then Incumbent of the same Parish; and that the Plaintiff had offered to do the duty, and was refused to be allowed to do so.

The damages are the amount of the Curate's stipend.

4. *Of the Evidence in Actions by or against Churchwardens, or Parish Officers.*

As the property of personal things belonging to the Church is in the Churchwardens, they may bring

(*f*) Martyn *v.* Hind, Dougl. 137.

Actions in their own names for them, as for money due to the Parish by former Churchwardens; so they may be sued for repairs done to the Church or Church-yard. (*g*) In both cases their appointment should be proved: this being by order of Vestry, the Vestry book containing their appointment should be produced by the Vestry Clerk, as the Person having charge of it.

If, however, they have given orders for any thing to be done in their character of Churchwardens, to the Church or Churchyard; it will be sufficient to prove the order so given; and it seems doubtful whether the general Evidence of their being Churchwardens, acting as such, would not be sufficient in all cases.

The amount of the demand against them must be proved as in other cases of work and labour, goods sold, &c. But it should be proved, that what was done was done to the Church, or some thing belonging to it.

But, though work has been done to the Church in pursuance of a resolution of a Vestry, the *Parishioners* who agreed to it cannot be charged. (*h*)

Parish Officers are liable to be sued in this Action, for money had and received by them in that character. Such as where the putative father of a bastard child has paid a sum of money to the Parish Officer for the

(*g*) Turner *v.* Baynes, 2 H. Black. 559.
(*h*) Lanchester *v.* Tricker, 1 Bingh. 201.

purpose of indemnifying the Parish; if by the death of the child, it ceases to be a charge on the Parish, the father may recover the surplus above the sum actually expended on account of the child. (*i*) In such Action the Plaintiff must prove the payment of the money to the Officers, on account of the child's being chargeable: the death of the child: and what were the reasonable expenses incurred by the Parish while it lived; and he will be entitled to the residue.

5. *Of the Evidence in Actions by or against Factors or Agents, or the owners of Goods sold by them.*

1. In the case of *Factors.* (*k*) The questions which arise as to the liability of Factors, and their rights to sue or be sued, are, as between them and the Buyers of goods, and between them and their Principals. In the case of Sales by them to others; if they buy or sell goods, though they are known to be sold or bought on account of others, they may maintain an Action for the price of them, or be sued in their own name. In that case the Evidence is, only of the sale and delivery to the Defendant, and their value.

The only points on which any question of Evidence therefore can arise, are on the part of the Defendant, who contests the Factor's right to recover; as to which these rules as to Evidence must be observed, 1. Where the Factor sues for the price of goods sold by him, (*l*) the Defendant may answer

(*i*) Cole *v.* Gower, 6 East. 110.

(*k*) 1 Esp. Dig. N. P. 129.

(*l*) Scrimshire *v.* Alderton, 2 Stra. 1182. Gonzales *v.* Sladen, Bull. N. P. 130.

the Action; by shewing, that the payment for them was stopped in his hands, by the owner of the goods having given him a notice to retain the money. (*m*) For that purpose, the Defendant must call witnesses to prove, that the goods claimed were the goods of such Person, and by him sent to the Plaintiff to be sold: for which purpose, the Plaintiff should have notice to produce the Invoice or Bill of Parcels sent by such Person with them to him as a Factor. The owner cannot be a witness for this purpose, as he is interested in stopping the money in the Defendant's hands: but it may done by his Clerk or Servant proving the sending or shipping them, and calling the Persons from the Waggon or Wharf, to prove the delivery of them to the Plaintiff, or by a witness who knows them and has seen them in Defendant's possession. The Defendant must then prove a notice to him from *the owner*, either written or verbal, not to pay over the proceeds to the Plaintiff, (the Factor,) *he* being the Principal: if it is in writing, his hand must be proved; if it is verbal, it is proved by a witness who heard it. But this notice is only available where the owner is not indebted to the Factor. (*n*)

2. When the owner of the goods sold by a Factor has given notice to the buyer, that *he* is owner, and not to make payment for them to the Factor, but to him, he may bring the Action in his own name.

(*m*) Schrimshire *v.* Alderton, 2 Stra. 1182.

(*n*) Drinkwater *v.* Goodwin, Cowp. 251. George *v.* Claggett, 7 T. Rep. 359.

In case the Action is brought by the Factor himself, the buyer can set off against the Factor a debt due by him to the buyer; and to a similar Action against the buyer, by the owner of the goods for the price, after such notice, the Defendant may set up as a defence, that the Factor was indebted to him, and that he sets off against the price of the goods the debt so due to him. In this case, the Defendant must, 1. prove that the Factor was indebted to him by shewing in Evidence on what account. 2. That he bought the goods from the Factor not knowing them to be another's, but considering them as his own. This latter piece of Evidence being, however, negative, may be disproved either by production of the Bill of Parcels from the Factor, in which the goods are described as the Plaintiff's, or by calling the Factor himself; for, in this case, he has no interest, being either indebted to the Plaintiff in the price of the goods, or so much of his debt to the Defendant being left undischarged: and he can prove the whole transaction.

3. So the owner may maintain an Action against the Factor, either for not accounting and paying over to him the value of the goods, or for misconduct in his duty.

If for not accounting: he must prove the delivery of the goods to the Factor for sale, and their value; and as there is an invoice, usually stating the prices at which they were to be sold; this invoice the Factor should have notice to produce; and if not produced,

a copy from the owner's own books will be Evidence. He should then prove a demand on the Factor for the proceeds of his goods, which he has not complied with; and if sold by the Factor, the Buyer will be a good witness to prove that fact, and at what price he bought them, which will fix the Factor with the amount.

If the Action is for misconduct, these points are to be attended to: That every Factor is bound to sell according to the usage of the Trade; (*o*) if for ready money, for ready money; if on credit, on the usual credit, (*p*) and he is bound not to sell to Persons of notoriously bad character; and to sell, not to pledge. If he fails in any of these respects, he is liable to an action for breach of his duty.

Such action, however, cannot occur where the Factor sells under a *del credere* commission, because he is then liable in his own person: but if he sells and makes returns of sales to buyers of no credit, and who, when applied to, cannot pay: if he sells at a longer credit than is warranted by the usage of Trade, or if the owner applies to have his goods returned, and he finds the Factor has pledged them, he may maintain an Action against him: the last of these cases is, however, the object of an Action of Trover against the Person who has got them.

The evidence, however, in these Actions is neces-

(*o*) 1 Esp. Dig. N. P. 131.
(*p*) Anon. *Per* Holt, C. J. Cas. K. B. 514.

sarily different, and must be settled accordingly as follows:

As all these cases are where an actual sale by the Factor has taken place, and he has not paid his Principal for them, the first step necessary to establish in Evidence is, that an actual sale has been made of the Plaintiff's goods. The Defendant's (the Factor's) own return of sales is the best Evidence in all these Actions; and the Plaintiff in that case must prove that he received it from the Defendant, by proof of his hand-writing or otherwise. But it is also proveable by *vivâ voce* Evidence. For as the owner has a right to stop the price of his goods in the hands of the Buyer; if, on the default of payment for them by the Factor, he finds out to whom he sold them, and on application to him, he finds that he has been insolvent and unable to pay: that they were sold at a longer credit than is usual: or that they were pledged: the Persons to whom they were so sold or pledged, are good witnesses to prove the fact.

If the Action is for selling them to an improper Person, it will not be sufficient for the Plaintiff to shew that the buyer was insolvent when the money was to be paid, if he was in good credit when the goods were sold; he must therefore apply his Evidence to that period. He should shew that he was at that time in bad credit, as, that he had been a Bankrupt, or compounded with his creditors a short time before, or that no one would deal with him. These are matters of fact not requiring the strict proof of Bankruptcy or the like: but are matters of reputation

to which witnesses may give Evidence from their knowledge of the particular fact, as, *e. g.* by a witness who proved a debt under his Commission. The Plaintiff must then prove a demand of payment for the goods from the Person mentioned as the buyer, at the regular time of payment expired, and that he was not paid: that is sufficient for the Plaintiff's case.

If the complaint of the Owner of the goods is, for selling them at too long a credit, he may maintain an Action against the Factor, as soon as the time of the usual credit is expired. (*q*) And he must prove what the usual time of credit is on the sale of goods of the description of his. What is the time of usual credit is matter of Evidence, which the Plaintiff must prove, by calling Persons in the trade, acquainted with the usual and regular credit, and then shewing by production of the Defendant's return of the Sales, proved as before mentioned, or by witnesses, that the goods in question were sold at a longer credit; and he will then be entitled to recover in that case, and the buyer of the goods will be a good witness, to prove at what credit he bought them.

So if the Owner's Action is for *pledging his goods*, that fact may be proved by calling the Person to whom the factor had pledged them, or by other proof.

2. In the case of *Agents.* (*r*)—Agents as such may maintain Actions in their own names for the goods of others which they have sold, or for any injury or

(*q*) Wiltshire *v.* Sims, 1 Campb. 258.
(*r*) 1 Esp. Dig. N. P. 132.

loss to them while in their care and custody. So also may *Auctioneers* who are considered as Agents for their Principals: but an Auctioneer can maintain no Action for the price of goods sold at his auction, unless the lot was actually knocked down to the Defendant, which he must shew. (s)

A Factor is in fact an Agent; and the law as to Agents generally, for the most part is the same as that respecting Factors. The only case of importance, under this head, is where the Agent is sued and seeks to protect himself under his representative capacity; when sued therefore in his own name, for the money of others which he has received as Agent, or for any act done in that character, he may set up and prove, that he was an Agent merely under the following circumstances:—which will amount to a defence.

If an Agent is sued for money received by him, in fact not on his own account, (t) he may give in Evidence: that he was known to the Plaintiff to be an Agent only for another, and that the Plaintiff paid the money to him voluntarily for the use of his Principal, or even by mistake for the same purpose, (u) and that he has paid it over to his Principal not having had any notice to retain it before Action brought. With this Evidence the Plaintiff cannot recover, if the

(s) Payne *v.* Cave, 3 Rep. 148.

(t) Sadler *v.* Evans, 4 Burr. 1984.

(u) Buller *v.* Harrison, Cowp. 565. Cox *v.* Prentice, 3 M. and S. 344.

payment was *bonâ fide* and actually made to his Principal before the Plaintiff demanded the money.

In that case, the payment of the money to the Defendant is the Plaintiff's Evidence, for which purpose he must shew on what account the Defendant received it, and that *he* was entitled to it; the Defendant must then shew, in answer to that case, that it was not paid to him on his own account, but for his Principal. He must then shew an *actual payment over of the money* to the Principal, before Action brought or any notice given to him to retain it: for his giving his Principal credit in account for it, or in his books, will not discharge him. (*x*) Payment to the Principal may be proved by calling the Principal himself, or a witness who saw the payment, or by the Principal's receipt, to which his hand-writing and the actual payment, and when made, must be proved by witnesses.

In general, where in other cases a man is known to have been an Agent only, and he gives up his Principal, the latter ought to be sued, unless the Agent has by some Act or declaration taken a responsibility on himself. (*y*)

To this the case of *Auctioneers*, who are Agents to their employers, affords some exceptions. From their business they must be known to be mere Agents to the Seller, and that the produce of what they sell is

(*x*) Cox *v.* Prentice, 3 M. and S. 318.

(*y*) Patterson *v.* Gandasequi, 15 East. 62. Waring *v.* Faveuck, 1 Campb. 85. Kymer *v.* Suwercrop, 1 Campb. 109.

his ; yet an Auctioneer cannot discharge himself in an Action brought to recover the deposit, by shewing that he has paid it over to the Seller, if when he sold he knew there was a defect in the Seller's title, or has paid it before he found a good title made out. (*z*)

Where the Principal is sued on some contract made by his Agent, (*a*) the Plaintiff must establish the fact that he was Agent, clear of all doubt ; and any Letters or Declarations of the Agent are inadmissible as Evidence, except what he has said or written at the time of making the contract, and forming part of what he was employed to do on the part of his Principal ; (*b*) and in all cases to establish his Agency. He must be either called himself, or some Person who can prove the employment, either by knowing the fact to be so, or by the Defendant's admission of it ; and where the agency is established, the Defendant may in answer shew,—1. That he was not a general Agent, or authorised in the particular transaction to act to the extent he did ; for unless the Agent is a general one, or so authorised, he cannot bind his Principal. (*c*) A special Agent is bound to act within the scope of his authority ; as if a Broker is authorised to buy one kind of silk, and he buys another, the Principal is not bound : (*d*) but if the authority of the Agent is not circumscribed, the Principal shall be bound.—2. The Principal may shew

(*z*) Edwards *v.* Hodding, 1 Marsh. 377. 5 Taunt. 815. S. C.

(*a*) 1 Esp. Dig. N. P. 132.

(*b*) Betham *v.* Benson, 1 Gow 45.

(*c*) Fenn *v.* Harrison, 3 T. Rep. 757.

(*d*) East India Comp. *v.* Hensley, 1 Esp. N. P. C. 111.

that the Plaintiff trusted the Agent: gave him time for payment without acquainting the Principal: and that shall discharge him. As the authority to the Agent may be by letter or by parol, the defence is proved accordingly. (*e*)

The case of *Stakeholders* is in analogy, to the law respecting Agents. If a Stakeholder *bonâ fide* pays over the money entrusted to him to one of the Parties, before he has notice from the other not to do so, and which if he had had in time, he would not have been warranted in doing, yet shall he not be liable to an Action. (*f*)

The rule is the same in all cases of Stakeholders on bets or wagers, the subjects of which are illegal. (*g*)

6. *Of the Evidence in Actions by or against the Owners of Ships.*

The property in Ships being regulated by the Statute of 26 Geo. III. c. 60. s 66. and 34 Geo. III. c. 68. s. 11., with respect to their being duly registered: in all Actions, by ship-Owners, that must be strictly attended to when it is necessary to go into Evidence of strict property in a Ship. (*h*)

(*e*) Wyatt *v.* Marq. of Hertford, 3 East. 147.

(*f*) *Ante*, 86.

(*g*) For what wagers are illegal, see Esp. Dig. N. P. Vol. I. p. 26.

(*h*) For the law respecting it, see Selw. N. P. title *Shipping* as to the sale, transfer, or property in Ships.

1. Actions of Assumpsit against *Ship-owners* are principally for repairs done to the Ship: for Seamen's wages: for the negligent carrying of goods: or for Salvage: in such Actions, where there are many Defendants on the Record sued in that character, their joint liability in this as in every Action which is founded on a contract, must be made out. (*i*)

For this purpose, if a Defendant is proved to have acted as Owner, or has represented himself as such; has given directions respecting the voyage to the Master, or given orders for any thing connected with the Ship to be done, no further Evidence is necessary to fix him as the Owner: but the distinct acts must be proved. (*k*)

But if others are joined with him who have done no act or appeared as Owners, they are fixed with demands connected with the Ship; first, by producing Evidence of the Ship's Register, in which their names appear. This is had from the Ship Registry Office at the Custom House, from whence the original Register will be produced.

But this Register alone, even though accompanied with the Affidavits of other part Owners, swearing that they and the Person sought to be charged as a part Owner, were the Owners of the Ship, (*l*) will not be sufficient Evidence to fix such

(*i*) 1 Esp. Dig. N. P. 133. *Ib.* 137.

(*k*) Westerdell *v.* Dale, 7 T. Rep. 306.

(*l*) Tinkler *v.* Walpole, 14 East. 226. Fraser *v.* Hopkins, 2 Campb. 170. 2 Taunt. 5. S.C.

Person, without further proof that he assented to the Register, or in some way recognised it. This proof may be had, by some Evidence of his representing himself on any occasion to be so: by proving his hand-writing subscribed to the Register: or by any act done by him, or order given in the character of a part Owner. The oath required by the statutes on the change of property in ships, is to be had with the Register, and should be produced and proved.

But though the name of a person may appear in the Ship's Register as the regular owner, and it *primâ facie* establishes a legal ownership, yet it is not conclusive; for the name may appear in the Registry after the party has ceased to have any interest; and he may shew that in his defence. In settling therefore that part of the Evidence, where it is to charge the owner, further proof should be had if possible of the Defendant's acting as owner by giving orders respecting it, as *per* Abbott, C. J., the true question in matters of this description is "On whose credit was the work done?" (*m*)

This Evidence therefore of ownership which is composed of written and parol Evidence, is indispensable in every case to establish the Defendant's liability in the character of Ship-owner, who is sued as such for any demand connected with the Ship; that is, therefore, the first piece of Evidence in all Actions against them.

The rest of the Evidence, where the Action is for re-

(*m*) Jennings *v.* Griffiths, Ryan and M. 42.

pairs, depends upon the nature of the Action; if it is for repairs done to the Ship, and the declaration is for work and labour, the Plaintiff must prove the orders given by the Defendant or the managing Owner, or by the Master: what was done, and the amount of it; this is done by the testimony of witnesses. (*n*) And the repairs for which the owner is liable when ordered by the Master, are not those only which are barely necessary, but for such as are fit and proper for the service on which the ship is ordered or engaged, and which the owner if present, and as a prudent man, would have ordered; such as coppering a vessel bound to Newfoundland or the Mediteranean. (*o*) In settling Evidence therefore in an Action for repairs, it is not sufficient for the Plaintiff to shew, that they were done by the Captain's orders. He should also have witnesses acquainted with the subject, to speak to the necessity and propriety of them as above stated.

If it is an Action for *Seamen's Wages* earned on board the Ship, the Declaration is for work and labour generally, even though the Seaman has signed Articles under Seal, and bound himself to serve for the Wages set opposite to his name. And the Stat. 2 Geo. II. c. 35. enacts, "That all articles between the Master or Mariners, for foreign voyages shall be in writing; that no obligation shall lie on the Seamen to produce them; nor shall he fail in any Action for the want of the production of them."

The course of Evidence therefore at Nisi Prius, in

(*n*) Yates *v.* Hall, 1 T. Rep. 73.
(*o*) Webster *v.* Seekamp, 1 Barn. and Ald. 352.

these cases, is for the Plaintiff to call for the Ship's Articles, which the Defendant is bound to produce, although no notice has been given to do so. (*p*) When produced, they shew the rate of Wages at which the Plaintiff served, and he is then called upon to prove the length of time which he served on board, which must be to the end of the voyage: this is usually done by some of the Crew who served with him.

If the Defendant does not produce the Ship's Articles, the Plaintiff is at liberty to give parol Evidence of the wages he was to receive; or, if he cannot go so far as to prove that, he may give Evidence on a *quantum meruit.*

This Statute, 22 Geo. 2. c. 35., however, applies to British not to foreign vessels, and the Statute mentions foreign voyages only. (*q*) In the case therefore of Suits for Wages on board foreign vessels, the Plaintiff must prove the hiring, the rate of Wages he engaged at, or if he has no Evidence of that, proof of the rate of Wages paid to others serving as he did, and the length of service, will be sufficient.

It should, however, be observed, as a proper caution to the Plaintiff's Attorney in practice, to take out a Summons, and procure a Judge's Order for the sight, perusal or a copy of the Ship's Articles,

(*p*) Bowman *v.* Manzelman, 2 Campb. 315.

(*q*) Dickman *v.* Benson, 3 Campb. 290.

as they often will be found to contain Covenants or Agreements between the Master and Crew, which may defeat the Plaintiff's Action. But, in every instance, the Plaintiff should be prepared to prove, that he served till the conclusion of the voyage; as if the Defendant proves that he left the Ship, or deserted before that time, he cannot recover. (*r*) So the Defendant may prove, that the Ship was lost, which equally deprives the Plaintiff of any claim for Wages. (*s*)

If the Action is against the Defendant, as Owner, *for negligence*, by reason of injuries sustained by goods shipped on board his vessel, or for any injury done by his ship, as *e. g.* by running down another: in the first Case, the Plaintiff should prove the shipping of the Goods: the injury which they suffered: and shew that it arose from negligent stowage, such as the want of sufficient dunnage, or the Ship not being watertight; in the second Case, He should give Evidence of the manner in which the accident and injury happened; and then in both cases shew the amount of the damage. In the first Case he should give Evidence of the deterioration of value in the goods when received, and the loss of the profits on the sale of them, if they were injured so much as to be unmarketable: in the second, the extent of the injury must be proved by witnesses, and what sum will be required to put the injured Ship into repair.

If the Action is for *salvage*, the Plaintiff should

(*r*) By Stat. 11 & 12 W. III. ch. 7.
(*s*) Hernaman *v.* Bawden, 3 Burr. 1844.

prove the services which he performed in saving the Defendant's Ship from becoming a wreck, and that but for the assistance which he rendered her she would have been lost: he must prove that his services were accepted under the pressure of necessity by the Master of the Vessel, and give in Evidence the opinions of sea-faring people as to what is a sufficient reward for them: he must also prove, that the Ship belonged to the Defendant. In this case if a Ship has been lost abroad, a decree in a foreign Court of Admiralty is good Evidence; (*t*) and it will be requisite clearly to shew the cause of injury, and connect it with the Ship, so that it may distinctly appear from what cause it proceeded.

2. The principal Action, *by* Ship-owners, is for Freight, Demurrage, or charges for the Shipping of Goods, general average, or on Policies of Insurance.

When the Plaintiffs sue as Ship-owners, to recover any of the above demands, they must prove themselves invested with the full legal Ownership required by the Statutes before mentioned, and owners during the time the freight was earning, or any of those causes of Action accrued. (*u*)

The regular mode of doing so is, as beforementioned, by the production of the Register and Certificate of Register and Affidavit from the Custom House, and proof of the names of all the Parties who are Plaintiffs, appearing as such, and some Evidence of their acting

(*t*) Cox *v.* May, 4 Maule and S. 152.

(*u*) Chinnery *v.* Blackburn, 1 Hen. Black. Rep. 117. *in not.*

as Owners is requisite. This is decisive: but general Evidence of Ownership, unless it is contested, will otherwise be sufficient at first. But it is perfectly well settled, that if any Persons declare as joint Owners of a Ship, and the Defendant gives the Ship's Register from the Custom House in Evidence, and the name of any of the Plaintiffs is wanting in it, the Plaintiffs must be nonsuited; for unless the Owner's name appears in the Ship's Register, &c. he is not a legal Owner, and therefore can maintain no Action. (*x*)

Having, however, first established a legal Ownership, if they sue for *Freight or Demurrage,* they must prove the Charter-party and Bill of Lading if any, or the hiring of the vessel for a particular voyage or time; the sum to be paid either by agreement, or on a *quantum meruit;* and prove that she performed the voyage or service, and that the goods were delivered to the Defendant, and the amount of the demand.

If the Action is for Freight on a Charter-Party of affreightment not under Seal, between the Plaintiff and Defendant; no proof of ownership is required, the Defendant having contracted with the Plaintiff in that character; in that case, therefore, the Plaintiff must prove the Defendant's signature to the Charter-party, and that the voyage was performed: the rate of payment being established by the Charter-party, ascertains the amount of the damages. The performance of the voyage may be proved by the Mas-

(*x*) Camden *v.* Anderson, 5 T. Rep. 709.

ter, or any one who sailed on the voyage; and any Person who is proved to have received the goods under the Charter-party, whether he is the Person named, Consignee, or Indorsee of it or not, is liable to the Action for Freight. The Plaintiff therefore must prove the delivery of the Cargo to the Defendant pursuant to the Bill of Lading, which is sufficient; and he must be proved to have received the Cargo under it, or on his own account. (*y*)

If the Action is for Demurrage, the Plaintiff must prove how long he was detained beyond the days allowed by the Charter-party, and the days must be working not running days. (*z*) Evidence should be therefore settled as to those days only.

If the Action is for general average, the Plaintiff must prove the loss and expenses incurred, and that they were brought on by inevitable necessity, and to save the Cargo: as where a Ship was obliged to throw her guns and stores over board to lighten her, and to save the Cargo: the necessity for doing so must be proved by witnesses who were on board her. (*a*)

If the Action is for a loss on a Policy of Insurance, the Evidence to be produced is as before stated, for which see *ante*, page 48.

(*y*) Brouncker *v.* Scott, 4 Taunt. 1. Cock *v.* Taylor, 13 East. 399. and Wilson *v.* Kymer, 1 M. and S. 157. Moorsom *v.* Kymer, 2 M. and S. 303.

(*z*) Cochran *v.* Retberg, 3 Esp. N. P. C. 121.

(*a*) Price *v.* Noble, 4 Taunt. 123. Birkley *v.* Presgrave, 1 East. 220.

6. *Of the Evidence on Actions founded on Contracts made by Servants.*

Vide head of Actions against persons standing in the relation of Master, *post*, page 162.

7. *Of the Evidence in Actions by or against Partners.*

1. *And first of the Evidence for the Plaintiff.*

In Actions, brought *by Partners*, to recover a Partnership demand or claim, (*c*) it is indispensable that all should join in it and appear as Plaintiffs on the Record ; for if it comes out on the Trial, that any one is omitted, it is a decisive ground of Nonsuit, though the Plea may be the General Issue.

If therefore the Plaintiff has declared in his own name only, the Defendant, by proving that when the goods were sold, the Plaintiff had a Partner, will nonsuit him.

If the Action is brought by a *surviving Partner*, for goods sold in the lifetime of his Partner, he must state himself in the Declaration as surviving Partner: if he does not, the Defendant by giving Evidence of that fact will nonsuit him. (*d*)

Whenever therefore before Trial, the Plaintiff's Attorney discovers the Error, he should take out a summons to amend, by describing the Plaintiff in the Declaration as surviving Partner ; and which, if he cannot effect, the Action must be abandoned : but which he may probably obtain, as the amendment does not go to the merits, or alter the nature of the demand.

(*c*) Camden *v.* Anderson, 5 T. Rep. 709.

(*d*) Jell *v.* Douglas, 4 Barn. and Ald. 374.

The Plaintiffs therefore must always be prepared with Evidence of their Partnership, (*e*) and to prove that all those whose names are on the Record are Partners in the demand or concern, for which the Action is brought: this is done by many ways, as by producing the Partnership Deed, and proving the execution of it by all the Plaintiffs; by the Evidence of the Solicitor employed for the Firm, and who knows who compose it; by the Evidence of a Clerk employed by them, or by any Person who has dealt with all in that capacity.

An exception is, however, to be observed to this rule, requiring such Evidence of the Partnership; that is in a case, where there are several Plaintiffs on the Record. If the Defendant *pays money into Court*, under a Rule, he thereby admits a contract made with those whose names appear as Partners, and he cannot controvert it by Evidence. The Plaintiff's Attorney should therefore have that Rule to give in Evidence.

2. Where a Partnership is in debt, and one of the Partners dies, and the surviving Partners continue their dealings with a particular Creditor, and the latter joins the transactions of the old and new Firm in one entire amount, the payment made by the surviving Partners from time to time must be applied to the old Debt. (*f*) When therefore the question is concerning Partnership payment, the above circumstance in settling the Evidence must be attended to, and the defence be relied on or abandoned accordingly.

(*e*) Ord *v.* Portal, 3 Campb. 239.

(*f*) Per Bayley, Just. in Simson *v.* Ingham, 2 Barn. and C. 72.

3. If the Defendants *are sued as Partners*, (*g*) the Plaintiff must prove that all the Persons whom he has made Defendants on the Record, were jointly concerned in the demand or concern on which the Action is founded at the time it accrued. (*h*) If they appear as Partners to the world, and carry on trade or any concern under a joint Firm, on giving Evidence that they do so, they may be sued as constituting that Firm. It will be sufficient for the Plaintiff in that case to shew that fact; and then the act of one of the Firm will bind them all, if the demand is connected with that business which they so carry on together. If, however, there is a dormant Partner whose name may be covered under the word Co., or who shares in the profits of the Trade or concern, though the word Co. be not used, and his name does not in any way appear, or any Person who may have joined in that which is the ground of Action; if he is made a Defendant, the Plaintiff must give distinct Evidence as to him, and shew that he had such an interest as constituted him a Partner, or that he is jointly interested in the particular matter which is the subject of the Action. This is to be done by *vivâ voce* Evidence of Persons acquainted with the Defendants and their course of dealing, or with the particular transaction in question. And the production of a Deed executed by all the Defendants as a Release to a witness in Court, was held to be sufficient Evidence of their being Partners. (*i*) Under this head of settling Evidence

(*g*) Bull. N. P. 129.

(*h*) Young *v.* Hunter, 4 Taunt. 582.

(*i*) Gibbons *v.* Wilcox, 2 Stark. 43.

it must never be forgot, that if the Action is joint against many Defendants, the Plaintiff must prove by distinct Evidence, that every Defendant on the Record was concerned in that which is the subject of the Action; (*k*) and if he fails to fix any one of them by Evidence, he must be nonsuited, for then the contract proved will be different from that declared on.

But though there may be many more Partners or Persons concerned in the transaction on which the Action is founded, than those who are sued and appear as Defendants on the Record, and that should appear in Evidence on the Trial; the Plaintiff will nevertheless be entitled to a Verdict, provided he fixes those by Evidence whom he has made Defendants; (*l*) for if they meant that the others should have been joined, they could only avail themselves of that circumstance by a plea in Abatement.

If there is a Plea in Abatement "That others ought to be joined," the Plaintiff may reply, "That the Defendant undertook solely, and not with others;" or he may deny the Defendant's Partnership with the others, whom it is pleaded ought to be joined. In this latter case, the Issue lies on the Defendant; for his Rejoinder must aver that they are Partners, and he must prove the Partnership by such Evidence as has been before observed in the case of Plaintiff Partners. If the Plaintiff relies on the cause of Action being the Defendant's only, and he only liable, the Issue lies upon him; and he must prove it, by

(*k*) Young *v.* Hunter, 4 Taunt. 582.
(*l*) Rice *v.* Shute, 5 Burr. 2611.

shewing that the Defendant alone contracted with him.

As if the Defendant pleaded Partnership, and that A.B. should be joined in the Action, and he has in fact no ostensible Partner; so that if the Plaintiff was to submit to the plea and enter a *cassetur billa,* he would in another Action against the Defendant and A. B., be under difficulties to fix A. B. as a Partner. It is better to reply, the sole undertaking and liability of the Defendant on the record. In that case it will be good Evidence, if the Action is *e. g.* for goods sold, to shew by witnesses, that the Defendant ordered the goods, that no other Person was ever seen or known to act as a Partner. And so in other cases.

So if the Defendant who is one of a Partnership, has promised individually to pay a debt, without making any mention of his Partners, such promise if proved, is conclusive Evidence, that the debt was due from him individually, and not by the Partnership; and he will not be permitted to shew, that the debt was in fact due from himself and his Partners, and so such Evidence would support the replication of his sole liability. (*m*) And as a plea of Partnership in Abatement must set out who are those whom the Defendant states to be Partners, and who should be joined in the Action, the Plaintiff may call any of the Persons stated in the plea, as witnesses, to prove that they were not in Partnership in the subject of the Action, and so falsify the Defendant's plea. (*n*)

(*m*) Murray *v.* Somerville, 2 Campb. 99. *in not.*

(*n*) Hudson *v.* Robinson, 4 M. and S. 475. Cossham *v.* Goldney, 2 Stark. 414.

There is no mistake into which I have found those in Practice so often fall, as the not distinguishing the cases, where the Evidence at Nisi Prius implicates more Parties than appear on the Record. The rule is this: if it appears by the Plaintiff's own shewing, or by Evidence adduced by the Defendant, that the *Plaintiff* has a Partner or Partners, or that there was any other Person or Persons jointly interested with Him in that which is the subject of the Action, and his or their names do not appear on the Record, the Plaintiff must be nonsuited; for as he necessarily knows all Parties with whom he is connected in the business, he ought to state truly with whom the Defendant's contract was made, by stating the names of all concerned, and joining them as Plaintiffs in the Action; otherwise the contract proved by Evidence is not that declared on.

But if it appears at the Trial, that the contract stated was with the Defendant and *others* who are not made Defendants, this shall not affect the Plaintiff's right to recover, if there was no Plea in Abatement, but he may recover against those who appear as Defendants on the Record; for he could not be conusant of all Parties concerned, and is therefore required to join those only whom he knows to be so.

2. *Of the Evidence for the Defendant in Cases of Partners.*

If there are any number of Partners in trade who are sued jointly, for Goods which appear to have been ordered in the way of the Partnership trade, or upon

Bills accepted and apparently connected with it, but to which one denies his responsibility; that Defendant may defend himself, by shewing that the *Partnership had been dissolved,* when the demand accrued. This may be done, either by proof of express notice of the dissolution given to the Plaintiff by parol or by letter, or by a notice in the Gazette. This last should be proved by production of the Gazette, and would be conclusive as against Persons who had no previous dealings with the Partnership: (*o*) but it would not be sufficient against Persons who had dealt before with the Firm. To them a special notice should have been given of the dissolution of the Partnership; the Defendant therefore must be prepared with Evidence accordingly.

In the case of Bankers, it has been held, that they should give a regular notice by a circular letter: but if the name of the Firm is changed, and so appears in their pass-books or checks, those who have used the new checks cannot take advantage of the want of a more express notice. (*p*) So the Defendant may shew that the transaction was not a Partnership one, but for the benefit of one or more of the other Partners, and that this fact was known to the Plaintiff; which knowledge must be clearly established. (*q*)

(*o*) Godfrey *v.* Turnbull, 1 Esp. N. P. C. 371. Gorham *v.* Thompson, Peake, N. P. C. 42. Graham *v.* Hope, Peake, N. P. C. 154. Gowram *v.* Hope, MS. 2 Esp. Dig. N. P. 277.

(*p*) Barfoot *v.* Goodall, 3 Camp. 147. Newsome *v.* Coles, 2 Camp. 617.

(*q*) Ridley *v.* Taylor, 13 East, 175.

As, *e. g.* if an Action is brought on a Bill of Exchange, bearing the acceptance of the Firm, in the hand-writing of one of them, which, by law, any of the Partners may do on the Partnership account; although the Declaration states the names of all the parties, any one of them may plead *Non-Assumpsit,* and shew by Evidence, that the Bill though drawn or accepted as by Co., was not for the Partnership use, but for the sole account of another Partner or Partners whose name or names do not appear on the Bill, but who composed the Firm, and that the Plaintiff when he took the Bill knew the fact to be so. Proof of these facts is indispensable, on account of the legal right which any Partner has to bind the Firm, and the Bill on the face of it would purport to be for the Partnership's use. This is matter of *vivâ voce* Evidence: but as most of these cases are matters of collusion between the Plaintiff and some of the Partners, in almost every case it is necessary to have recourse to a Bill of discovery as the only mode of getting at the truth.

So if the Action is for goods furnished to Partners in the way of trade, any Defendant may give in Evidence that he was an infant incapable of trading: or if the Defendant was a woman, she may shew that she was a Feme Covert.

8. *Of the Evidence in Actions by or against Assignees of a Bankrupt.*

These Actions are brought by the Assignees to recover part of the Bankrupt's property, from those who

were indebted to the Bankrupt, or who have got possession of it after an Act of Bankruptcy has been committed: if the Action is to recover money, such as money lent, or the price of goods sold, and the like, the Action is Assumpsit: if it is to recover property, such as goods, if they remain *in specie*, or the Defendant has disposed of them to his own use, it is Trover.

To enable the Assignees to recover back money which has come to the hands of a Defendant after an Act of Bankruptcy, the Assignees must give precise Evidence, of the day on which the Act of Bankruptcy was committed, and then of the time when the money of the Bankrupt came to the hands of the Defendant, so that it may appear that the receipt of the money was subsequent to the commission of the Act of Bankruptcy, as from that time the property is in the Assignees. That Evidence is therefore a *primâ facie* case for the Assignees.

If the Action is to recover back money paid by the Bankrupt to a Creditor, he having then committed an Act of Bankruptcy; although the Assignees make out in proof such a case as is just mentioned, the Defendant may answer it by shewing that the Bankrupt paid it to him, either on account of goods which he had sold to the Bankrupt, or in payment of a Bill of Exchange of which he was the holder in the ordinary course of trade and dealing, he then being ignorant that he was a Bankrupt or insolvent. (*s*) The strictest Evidence is required that the money was due on either of those accounts; and therefore the Defend-

(*s*) Stat. 19 Geo. 2. 32. 1 Esp. Dig. N. P. 149.

ant must be prepared to give it, as the statute protects payments made on such accounts only.

If the Action is to recover from a Creditor of the Bankrupt a debt which he owed, but had paid to the Bankrupt or his order on any account after an Act of Bankruptcy. Such as if a Banker was to pay out of money in his hands of the Bankrupt, checks drawn by the Bankrupt, after he knew that the Bankrupt had committed an Act of Bankruptcy, that payment would not be allowed. The Evidence for the Assignees would be, after proving an Act of Bankruptcy prior to the payment, to charge the Defendant with all the money in his hands, without deduction of what he had so paid to the Bankrupt or his order; still however the Defendant on proof of the payment would be entitled to deduct it, unless the Plaintiff also proved that the Defendant knew of the Bankrupt's insolvency at the time he paid it. For the statute (*t*) protects payments so made without knowledge of an act of Bankruptcy committed.

In every case therefore of Actions brought by the Assignees, to recover money paid by or to the Bankrupt after an Act of Bankruptcy committed; if the money was paid by him for goods sold to him by the Defendant in the Action or in payment of a Bill of Exchange, on which he was a Party; or if it is to recover from a Person who was a debtor to the Bankrupt, and paid the debt to him after an Act of Bankruptcy committed, to entitle the Plaintiff to recover he must give Evidence that the Defendant, when he received or paid the money, knew that the Bankrupt had become so, or was insolvent. This Evidence is to

(*t*) Stat. 1 Jac. 1. c. 15. s. 14.

be had from circumstances which the Defendant must have known; such as of the Bankrupt's Bills having been dishonoured: that he has been arrested; and this Evidence will defeat the defence afforded by the Statute. And it is not sufficient, that a Trader has property sufficient to pay 20*s*. in the pound: he is deemed insolvent, when unable to pay his debts regularly, and in the course of business. (*u*)

Before however the Assignees can go into any Evidence of the cause of Action, they must establish the Commission under which they act. This is regularly done by going through all the steps respecting the Trading, Petitioning Creditor's Debt, and Act of Bankruptcy, hereinafter mentioned.

This course of Evidence underwent a considerable change since the passing the Act, 49 Geo. III. c. 121. s. 10., by which, whether the Assignees are Plaintiffs or Defendants, the production of the Proceedings under the Commission are made Evidence; that is, the Depositions as to the Trading, Petitioning Creditor's Debt, and Act of Bankruptcy made before the Commissioners, are declared to be sufficient Evidence of those matters, unless the Party is called upon by the other side to prove them at the Trial. But the proceedings are not to be considered as conclusive, and may be controverted by Evidence. (*x*)

This is done by a notice served on the opposite Attorney, requiring him to prove all these matters, or any of them. If the Defendant calls upon the Plaintiff to do so, he must give that notice before he

(*u*) Shone *v.* Lucas, 3 Dowl and Ry. 218.

(*x*) Mills *v.* Bennet, 2 M. and S. 556.

pleads; if the Plaintiff calls upon the Defendant to do so, it must be before Issue joined: but where no notice has been given, the Proceedings are of themselves admissible Evidence for every purpose, but not conclusive. (*y*)

When, therefore, the Assignees are required to prove every step of the Bankruptcy, (*z*) and which is necessary to invest them with the character of Assignees, they must prove that the Bankrupt was a Trader; this is done by a witness acquainted with the business which the Bankrupt followed before he was declared Bankrupt. The next step is the petitioning Creditor's debt. This may be proved either by written Evidence; such as by a Bill of Exchange or Promissory Note, on which the Bankrupt's name appears, and proving his hand-writing as before directed in Actions on Bills of Exchange: by his Bond or Warrant of Attorney to confess a Judgment, the execution of which must be proved by the subscribing witness, if there is one to it; so it may be proved to be for goods sold and delivered to him while in Trade, by the Evidence before mentioned, (pag. 96.) on the Count for goods sold; so for money lent; and it may, lastly, be proved, by giving Evidence of an acknowledgment by the Bankrupt, that he was indebted to the Petitioning Creditor in a sum of £100. or upwards: but this acknowledgment must appear to have been made by the Bankrupt before the Act of Bankruptcy; (*a*) or, if there are more Creditors than

(*y*) *Post.*

(*z*) Skaife *v.* Howard, 2 Barn. and Cres. 560.

(*a*) Dowton *v.* Cross, 1 Esp. N. P. C. 168. Watts *v.* Thorp, 1 Campb. 376.

one, proving their respective Debts in the same way.

The next step is theAct of Bankruptcy. As these are many they are proved by *vivâ voce* testimony of a witness swearing to the fact necessary to constitute an Act of Bankruptcy; such as of the Bankrupt being denied to a Creditor, *e. g.;* which must be done by the witness who denied him, he being then at home; and in this case the Bankrupt's declaration of his situation, as that he went out of the way to avoid his Creditors, or was denied to one, because he could not pay, or letters written by him to that effect, are good Evidence. (*x*)

But the Act of Bankruptcy must be *bonâ fide, and not a concerted one;* such as, *e. g.* that the Petitioning Creditor should call on the Bankrupt for payment on a particular day, and that he should be denied, which would be a colourable Act of Bankruptcy; and, if given in Evidence at the Trial, would defeat the Commission. But it will not affect the validity of the Commission at Law, though it may in Equity, that the Commission was sued out at the request of the Bankrupt himself. (*y*)

The last proof is the execution of the Assignment of the Commissioners by the subscribing witness. This is now seldom required in the King's Bench: but this is rather by a general understanding, and by no positive rule; and therefore should not be relied

(*x*) Rawson *v.* Haigh, 2 Bingh. 99.
(*y*) Shaw *v.* Williams, Ryan and M. 19.

on, without an express understanding to that effect. But the Deed itself must be produced.

This is the strict proof required in cases of Actions by the Assignees; and they are bound to give it if called on, with this exception, that if the Defendant has been employed by them as Assignees; (z) as, for example, to sell part of the Bankrupt's property, he cannot call upon the Assignee to prove the Commission as in other cases; for, having dealt with them in that character, he cannot afterwards dispute it. (*a*)

But where notice has been given of disputing the Commission, or any part of it; the Party giving the notice must be prepared to prove the service of it, by the witness who served it on the opposite Party; and who must either have a copy of it; or if notice has been served on the opposite Party to produce it, and it is not produced, prove its contents by parol.

2. When no notice has been given by the opposite Party, the Depositions are produced at the Trial by the Solicitor under the Commission. The opposite Party may require any Deposition to be read; and is at liberty to raise any objection, as to its insufficiency to establish that which it is meant to do, and as it appears on the face of the Proceedings, or to bring Evidence to disprove it, for it is not to be taken to be conclusive; (*b*) as, for example, if the Bankrupt, who

(z) Dickinson *v.* Coward, 1 Barn. and Ald. 677.
(*a*) Maltby *v.* Christie, 1 Esp. N. P. C. 342.
(*b*) Ellis *v.* Shirley, 3 Campb. 424.

in order to become such must be found to be a Trader, appears on the face of the Proceedings by the deposition as to his Trading, to have been a Farmer, and to have bought or sold nothing but for the use or produce of his Farm, the Party may object that this does not establish a Trading within the Bankrupt Laws.

So where the Proceedings being produced, the petitioning Creditor's debt was stated in them to be, "that the Bankrupt was indebted to him as the Drawer of a Bill of Exchange," but neither stated its dishonour by the acceptor, nor notice to him, this was held not to be sufficient to support the Commission, though no notice had been given that it was meant to be contested; for the Bankrupt would not have been legally the Debtor, unless the Bill had been dishonoured by the Acceptor, and he had notice. (*c*)

So though the objection does not appear on the face of the proceedings which find him a Bankrupt by reason of £100. being a supposed debt to A. B. the petitioning Creditor, the Defendant may call witnesses to prove that that debt was paid before the suing out of the Commission, so that there was no legal petitioning Creditor's debt to support the Commission; for the Proceedings, when produced, are only *primâ facie* Evidence of those matters declared to be so by the Statute. (*d*)

The rule therefore in settling Evidence for the

(*c*) Cooper *v.* Machin, 1 Bingh. 426.

(*d*) Bull. N. P. 43. Chapman *v.* Gardiner, 2 H. Bl. 279. Field *v.* Curtis, 2 Stra. 829. Hoffman *v.* Pitt, 5 Esp. N. P. C. 22. Wyatt *v.* Wilkinson, 5 Esp. N. P. C. 187. 1 Selw. N. P. 239.

Plaintiff in cases of Bankruptcy is this, that the Depositions under the Commission are admissible, but not conclusive as to the matters to which they apply; and that, as has been stated, the Defendant may object to them, or offer Evidence to disprove them. The Proceedings must be carefully looked to, to see that there is sufficient on the face of them to establish the Trading, petitioning Creditor's debt, and the Act of Bankruptcy. If they are insufficient, as in the Cases stated above, he should be prepared with further Evidence to establish what is wanting. As in the case of Cooper *v.* Machin, *supra,* he might have given Evidence of the presentment of, and dishonour of the Bill by the Acceptor, and of the notice to the Bankrupt, which would have been sufficient.

3. *As to the vivâ voce Evidence, admissible in this case, these points are to be observed in settling all that Evidence.*

1. *The Bankrupt or his Wife* are inadmissible witnesses to prove any fact in support of the Commission: but having obtained his Certificate, and released to his Assignees his claim to the surplus and to the allowance given by the Statute, he may be examined as a witness in support of any Action brought to recover any part of his property by his Assignees; which by that Action they seek to recover: but it is to that point only, and not to establish or prove any matter in support of his Commission. And without having obtained his Certificate, he may be called as a witness against his Assignees, in questions respecting his property; as, for example, if his Assignees sued a Person on a Bond made to the Bankrupt before his Bankruptcy, the Defendant may call him to prove it

paid, though he has not got his Certificate. For being entitled to an allowance according to the dividend he makes, by disproving a debt due to his estate, he diminishes the fund, and so is giving Evidence against his own interest, and is therefore not objectionable.

The Bankrupt may be a witness in an Action brought by his Assignees *qui tam* against the person who has won money from the Bankrupt at play after the act of Bankruptcy committed: but, to render him competent, three releases are necessary,—1. His own release of the allowance and surplus under his Commission —2. A release from all his creditors to him of their respective debts.—3. A release from the Assignees to him. (*d*) Where therefore it is necessary to call the Bankrupt as a witness in such an Action, in settling the Evidence, all these releases should be had and duly executed to give in Evidence.

2. *A Creditor*, who has not proved his debt under the Commission, is an inadmissible witness, to increase the fund out of which he may receive a Dividend, but may be allowed to prove what barely goes to support the Commission. (*e*)

But he may be made competent by a release of his debt, thereby depriving himself of all benefit under the Commission, or having sold his dividend; and he is a competent witness to prove the signatures of the Commissioners to the proceedings under his Commission. (*f*)

(*d*) Carter *v.* Abbott, 1 Barn. and C. 444.

(*e*) Williams *v.* Stevens, 2 Camp. 301. 2 Ves. and B. 177. 1 Rose, 392. in not. Granger *v.* Furlong, 2 Black. 1273.

(*f*) Morgan *v.* Pryor, 3 Dowl. and Ry. 216.

But a petitioning Creditor may be a witness to defeat a Commission, or to disprove the amount of his own debt, but not to support the Commission. (g)

And note, that if it is a joint Bankruptcy, there must be distinct proof of the Bankruptcy of each;—and these further matters of Evidence on the part of the Plaintiff are to be attended to.

4. Though the Plea of Bankruptcy states generally that the Defendant became a Bankrupt, and does not mention the Certificate which is in fact the Defendant's answer to the declaration; and discharges the debt; the Bankrupt proves his Plea by the bare production of his Certificate, and so establishes his defence by its being a *primâ facie* answer to the Plaintiff's case, the Plaintiff then can only succeed, by going into Evidence to establish some one of the following points by which the operation of the Certificate is defeated;—(*h*) and which he may do when issue is joined on the Plea of Bankruptcy, without replying them. (*i*)

1. He may shew the Certificate to be void by reason of the Bankrupt having given on the marriage of a child 100*l.*, unless he had then sufficient to pay his debts.—2. That he has lost in one day 5*l.* or 100*l.* in twelve months before his Bankruptcy, by gambling or playing at the games mentioned in

(*g*) Green *v.* Jones, 2 Camp. 411. Loyd *v.* Stretton, 1 Stark. 40.
(*h*) 1 Esp. Dig. N. P. 192.
(*i*) Hughes *v.* Morley, 1 B. and A. 22.

Stat. 5 Geo. II. c. 30. or by stock-jobbing. That he has done so, is matter of *vivâ voce* Evidence, by calling as witnesses, the persons who have played with him, or seen him lose the money, or pay it on any of these accounts. This was done with effect in the case of Bateson *v.* Hartsink, 4 Esp. N. P. C. 43. —3. Or he may shew that it is void under the Stat. 24 Geo. II. c. 57. s. 9. by the Bankrupt's fraudulently permitting proof of debts, under his Commission, by persons to whom he was not indebted in the sums so proved, and that they have signed his Certificate: to do this, the persons themselves may be called, or it may be proved by collateral Evidence, that they were not Creditors. This was done, and the Certificate avoided in a case of Edmonstone *v.* Webb, 3 Esp. N. P. C. 264.—4. The Plaintiff may shew that the Bankrupt had been a Bankrupt before, or had compounded with his Creditors; and, the Certificate under the second Commission being produced, that he had not paid 15*s.* in the pound. (*k*) To establish this, the Plaintiff should produce the first Commission or Proceedings under it. (*l*) If that Evidence cannot be had, there should be a *subpœna duces tecum* to the Secretary of Bankrupts, or to the proper Officer, to produce the Document or Entry from the Bankrupt Office, of the issuing of the first Commission: if he compounded with his Creditors or Creditor, any other witness may prove the fact. (*m*) And if it was by Deed, the Deed should be produced and proved by the subscribing witness. But the Composition

(*k*) Philpott *v.* Corden, 5 T. Rep. 287.

(*l*) Gregory *v.* Merton, 3 Esp. N. P. C. 195.

(*m*) Jelfs *v.* Ballard, 1 Bos. and Pull. 467. Coverly *v.* Morley, 16 East. 225. Edmonson *v.* Parker, 3 Bos. and Pull. 185.

with Creditors, which is required, must be a general Composition with all the party's Creditors; and for his own separate Debts, not for those of a Partnership. (*n*) The Bankrupt, by the production of the Certificate, admits the issuing of the second Commission, and it lies upon him to prove that he paid 15*s*. in the pound.—5. The Plaintiff may, lastly, shew, that the Bankrupt gave money to some of his Creditors to induce them to sign his Certificate, for this renders it void. (*o*) This may be proved by the Person who had the money, or by any witness who knows of it.

2. If the Certificate has been regular, the Plaintiff may, notwithstanding the Debt was prior to his Bankruptcy, and so would be barred by the Certificate, give in Evidence a *promise made by the Bankrupt* to pay it since he became Bankrupt, for that will bind him. (*p*)

This promise may be proved either by letter, or by a witness who heard the Bankrupt make it; the witness must be accurate as to the time when it was made, so that it should appear to have been made after the Bankruptcy. The same accuracy of proof must be attended to, if it has been made by letter, and the Bankrupt's hand-writing must be proved.

In addition to which, it must be observed, in set-

(*n*) Norton *v*. Shakespeare, 15 East. 619. Slaughter *v*. Cheyne, 1 M. and S. 182.

(*o*) Phillips *v*. Dicas, 15 East. 248.

(*p*) 1 Esp. Dig. N. P. 192. Truman *v*. Fenton, Cowp. 544.

tling the Evidence, that the proof must be of an absolute promise to pay, not of a conditional or qualified, one. (*q*) If a conditional promise "as to pay when he was able," the Plaintiff must not prove the promise only; but the Defendant's ability to pay, by giving Evidence as to his real or apparent circumstances. (*r*) Therefore, in settling the Evidence, the very words used by the party must be accurately attended to; for the promise must be precise and positive: as *e. g.* for the Bankrupt to say, in general terms, "my effects will pay 20*s.* in the pound," or, "that he will pay every body," are too vague to be binding. This will govern the Plaintiff as to proceeding.

3. The Plaintiff may shew, from the nature of his demand, that it was not proveable under the Commission, for to such only the Certificate is not a bar; such as that it did not arise, *ex. gr.* until after the Bankruptcy. That is a matter of fact to be proved by Evidence and dates.

9. *Of the Evidence in Actions of Assumpsit by or against Executors or Administrators.*

In this, as in every case, in which a Plaintiff sues in a representative capacity, he must shew himself to be completely invested with that character. The power of the Executor is derived from the Probate of the Will; and of the Administrator, from the letters of Administration. Of these, *Profert* is made in the

(*q*) Besford *v.* Saunders, 2 H. Black. 116.
(*r*) Lynbury *v.* Weightman, 5 Esp. N. P. C. 198.

Declaration: but the Plaintiff is not called upon to produce them at the Trial at Nisi Prius, unless the Defendant has pleaded "*Ne unques Executor,* or *Administrator,*" in which case the production of the Probate or Letters of Administration under the Seal of the Ecclesiastical Court is *primâ facie* sufficient for the Plaintiff, to establish the death of the Testator, and Plaintiff's right to sue. (*s*)

But that is not conclusive on the Defendant; he may shew that the Probate or Letters of Administration are void, as that the deceased had *bona notabilia* in different Dioceses, and that the Probate produced was not a Prerogative one; that is matter of *vivâ voce* Evidence, shewing the different property of the Testator, and where it lay.(*t*) So he may shew, that the Letters of Administration are not of sufficient extent; as if, for example, the Suit was for a Bond due to Testator for 1000*l.*, and the sum sworn to, and in the Letters of Administration was under 100*l.*, that will appear on the face of the proceedings, and the Plaintiff cannot recover.(*u*)

So, in the case of an Administrator, the Defendant may prove that the Letters of Administration were recalled; that is done by the Evidence from the books of the Spiritual Court where Administration is granted, shewing that they have been so.

The Evidence, in Actions against Executors and

(*s*) Lloyd *v.* Finlayson, 2 Esp. N. P. C. 564. Noell *v.* Wells, 1 Sid. 359. Bull. N. P. 247. 1 Esp. Dig. N. P. 232. *plen.*

(*t*) Rex *v.* Loggon, 1 Stra. 74.

(*u*) Hunt *v.* Stevens, 3 Taunt. 113.

Administrators, will be more fully treated of in the next Chapter. It may be sufficient here to observe, that in Actions against an Executor or Administrator, though he does not plead *non-assumpsit*, but *plenè administravit* only; yet the Plaintiff is bound to prove the extent of his demand, or he will be entitled to a verdict for 1*s*. only. (*t*) And, to prove a debt due to the estate, a Legatee who has been paid his Legacy is a good witness. (*u*)

10. *Of the Evidence in Actions by and against Husband and Wife—against the Husband alone, and against the Wife alone.*

1. In the case of Actions by Husband and Wife—it should be observed, that the Wife is joined with her husband as a party on the Record, in those cases only, where the right of Action would survive to her, or where she is the meritorious cause of Action; that is, where the cause of Action accrues in her right, as on a Bond *e. g.* or for any simple contract debt due to her before Marriage. (*x*)

In all cases, therefore, in which the Plaintiffs are Husband and Wife, their Marriage should be proved. This is done by a copy of the Register and proof of cohabitation, or the testimony of a witness who was present at the ceremony; mere reputation will not be sufficient. *Vide plen. post*, Chap. of Adultery.

(*t*) Shelly's case, Salk. 296.

(*u*) Clarke *v.* Gannon, Ryan and M. 31.

(*x*) Buckley *v.* Collier, Salk. 114. Bidgood *v.* Way, 2 Black. Rep. 1236. 1 Esp. Dig. N. P. 153 to 158, and Cas. *ibid.*

The Plaintiffs should then prove the demand, and that it was due to the Wife in her own right, and before Marriage; as *e. g.* if she followed any business before Marriage, and the debt had arisen in it, or a Note or Bill of Exchange was given to her in her maiden name. In the former case the business must be proved, and that the debt arose out of it; in the latter, the writing speaks for itself, on proof of the Defendant's hand-writing.

2. In the case of Actions against Husband and Wife, if the Wife is indebted before Marriage, the Action must be against both Husband and Wife, and cannot be supported against the Husband alone. (*y*) If he, therefore, is sued alone: by proving that the debt for which the Action is brought was contracted before Marriage, the Plaintiff will be nonsuited; that fact will appear either from the Plaintiff's witnesses, or by direct proof, which must be brought forward by the Defendant.

But though in Actions *by* Husband and Wife, the Plaintiff must prove an actual Marriage: in Actions *against them* as Husband and Wife, or against him for a demand on her account; the Plaintiff is called upon for no such proof. (*z*) It is sufficient for him to prove, that they passed for Man and Wife with his consent, as by suffering her to use his name; in which case, it is only necessary for the Plaintiff to call witnesses to establish that fact, and then to prove his cause of Action as con-

(*y*) Mitchinson *v.* Hewson, 7 T. Rep. 348.
(*z*) Bull. N. P. 136.

nected with it, as *ex. gr.* goods sold to her for wearing apparel.

Of the Evidence for the Defendant in Actions against the Husband and Wife, or against him only, for debts of her contracting.

For debts contracted by the Wife after Marriage, the Husband must be sued alone; and it will be necessary to shew what Evidence in such cases he may give to meet such demands.

1. The Defendant to an Action for goods furnished to his Wife may shew, that they were not Necessaries, or suited to his rank in life. (*a*)

The description of the Articles which the Plaintiff goes for, will shew whether they are necessaries or not; (*b*) and that may depend on their quantity, or the charges for them; as if a Mercer sues a Defendant for silk furnished to his Wife; the Husband may be liable to a certain extent: but if they are extravagantly expensive, and furnished to the Wife of a man in moderate circumstances, it will be incumbent on the Defendant to give in Evidence what his circumstances are, and shew, that with relation to them, the demand is excessive; that is matter of *vivâ voce* Evidence, but such Evidence must be given. Thus, *e. g.* if the Wife of a Clergyman runs him in debt, and he is sued, he may shew the

(*a*) Manby *v.* Scott, 1 Lev. 4. 1 Esp. Dig. N. P. 153.
(*b*) Manby *v.* Scott, 1 Lev. 4.

amount of his Preferment, and that it is inadequate to such a demand.

2. He may shew, that though some of the things were necessaries, that he supplied his wife with a sufficient allowance to pay for them, which the Tradesman had notice of; and yet knowing it, had suffered his wife to run in his debt. But the Tradesman may answer this by shewing that the allowance was not regularly paid. (*c*)

3. He may shew that the Tradesman, by collusion with the Wife, ran him in debt; that he furnished her with articles concealed from her husband; that he made *her* debtor in his books, and not the Husband. (*d*)

These circumstances are matters to be proved by witnesses; and the Plaintiff should have notice to produce his books.

4. The Defendant may prove notice given to the Plaintiff, not to trust his Wife, previous to the furnishing of the Goods for which the Action is brought. (*e*) In that case, if a Tradesman after such notice furnishes her with goods, the Husband will not be liable.

It is not uncommon for a Person to give a general notice in the Newspaper to Persons not to trust his Wife; it has been ruled by Lord Kenyon, that that

(*c*) *Per* Bayley, J. in Cas. Holt *v.* Bryan, 4 Barn. and Ald. 254.
(*d*) Bentley *v.* Griffin, 5 Taunt. 356.
(*e*) 1 Esp. Dig. 154. Etherington *v.* Parrot, 1 Salk. 118.

general notice is insufficient, unless it is brought home to the Plaintiff. If a particular notice has been given by the Husband to the Tradesman not to trust his Wife, the Defendant should prove, by a witness, the giving such notice verbally to the Plaintiff, or by letter; in the latter case, the Plaintiff should have notice to produce the letter, and if not produced, a copy may be proved. So though there had been a general notice in the Newspapers only; yet if it could be proved, that the Plaintiff had read the paragraph in the Newspaper, warning all persons not to credit the Defendant's wife, that might be sufficient, but not otherwise.

5. The Husband may give in Evidence, that the Wife had eloped from him, and was living away from him when the debt was contracted. (*f*) And that, whether her elopement was adulterous or not, unless he has refused to take her back, her elopement not being adulterous, will be a good defence.(*g*)

This fact must be clearly proved by witnesses; such as the leaving of her Husband's house, the place of her residence when she had the goods, and her never being at her Husband's house during the time. As this elopement is often adulterous, if it can be proved, that when so living apart from her Husband, she was cohabiting with another man, that is decisive Evidence for the Defendant.

(*f*) 1 Esp. Dig. 154. Robinson *v.* Greinold, Salk. 119. Morris *v.* Martin, 1 Stra. 647. Manwairing *v.* Sands, 1 Stra. 706.

(*g*) Child *v.* Hardyman, 2 Stra. 875.

But in such case the Defendant should be provided with proof to shew, that the elopement was not caused by his ill-treatment of his Wife: as, in case it proceeded from that cause, he will be liable for necessaries. (*h*) For, if compelled to leave his House in consequence of ill-treatment, he will be liable. (*i*)

6. The Defendant may shew that his Wife lived apart from him, but that she had a separate allowance for her support. This is a fact to be proved either by a Deed of Separation, or the testimony of witnesses who were acquainted with the Parties: but the Husband must go further, and give in Evidence at the Trial, that the allowance he gave his Wife was proportioned to his circumstances, and was regularly paid. (*k*)

If the Action is against the Wife alone, she may plead that she is a married woman, and prove her marriage as before described: but the Plaintiff may make her personally liable in the Action by proving, 1. That the Husband is an alien enemy, and abjured the realm. (*l*) 2. That he has been transported for felony, or that he is a foreigner, (*m*) and resided out of the Country, and so was not amenable to the

(*h*) Bolton *v.* Prentice, 2 Stra. 1214. Horwood *v.* Heffer, 3 Taunt. 421.

(*i*) Shepherd *v.* Mackoul, 3 Campb. 326.

(*k*) Hodgkinson *v.* Fletcher, 4 Campb. 70.

(*l*) Co. Litt. 132, 133. Deerly *v.* Duchess of Mazarine, Salk. 116.

(*m*) Sparrow *v.* Caruthers, cit. 2 Black. Rep. 1197. De Gaillon *v.* L'aigle, 1 Bos. and Pull. 357. Kay *v.* Duchesse De Pinne, 3 Campb. 123.

laws of it. These are all capable of *vivâ voce* proof: but, in the case of Transportation, the Plaintiff ought to have a copy of the Husband's conviction, and proof that he was the Person convicted and transported.

But under any other circumstances, such as her having a separate estate or maintenance, or being a sole trader in London, the Wife cannot be sued alone. If therefore she is so, on giving Evidence that she was a married woman, the Plaintiff must be nonsuited. (*n*)

II. *Of the Evidence in Actions against Persons standing in the relation of a Parent.*

A Father is bound to provide necessaries for his Children under age, while they remain part of his family, or where he gives them credit. To support this Action, it is necessary to shew, that what was furnished by the Plaintiff was suitable to the Father's circumstances in life: that the child was at the time part of his family: and that what was furnished was reasonable, and not extravagant.

For this purpose, the Plaintiff must shew, what was the ostensible situation in life of the Father: whether a person in trade or business, or living on his fortune to all appearance: for a stranger cannot know what his real fortune or circumstances are. This is proveable by persons who know him, or who reside in

(*n*) Marshall *v.* Rutton, 8 T. R. 545.

the neighbourhood where he does, and will make a *primâ facie* case for the Plaintiff: but which the Defendant may meet, by shewing what his real circumstances are; and so he may shew that the child was in service or in possession of some employment sufficient for his support, or that he gave him an allowance sufficient to pay for necessaries, and that the things were ordered by himself, not by the Father.

12. *Of the Evidence in Actions against Persons standing in the relation of Masters or Servants.*

A Master is bound by a contract made by his Servant, as far as he has given him authority, and he acts within it; (*o*) and where the Master has adopted the act of the Servant in one instance, he is bound by similar acts of the Servant afterwards. (*p*) As if he authorized his Servant to order goods on credit, and he afterwards paid for them; if the Servant afterwards orders others, of which he defrauds his Master, the Master is liable: but if the Master had no dealing with a Tradesman directly, but gave money to his Servant to pay for what was furnished, and the Servant embezzles the money, the Master is not liable. (*q*) Where an Action is so brought for goods ordered by the Servant, and defended on these grounds, the Plaintiff must prove the delivery of the goods to the Defendant, or at his usual residence:

(*o*) 1 Esp. Dig. N. P. 140. Ward *v.* Evans, Salk. 442.

(*p*) Hazard *v.* Treadwell, 1 Stra. 506.

(*q*) Kendal *v.* Andrews, and Fry *v.* Robinson, MS, Per Lord Kenyon, at N. P. 1 Esp. Dig. N. P. 141.

that he had the use of them; and then the Master is called upon to prove that he regularly gave the money to the Servant who ordered the goods, to pay for them: in which case, unless the Plaintiff can prove that the Master had paid debts of the Servant's antecedent contracting, or a direct order to him by the Master, he will be nonsuited.

But no Action is maintainable against the Servant, where he was known to be so, and dealt with and treated as such; (*r*) in that respect the Law is the same as in the case of Agents. But where a Person is so sued, he must prove clearly, not only that he was but a Servant and employed by others, but that the Plaintiff knew in what character he was acting.

Such is the Evidence required where the Parties sue or are sued in a representative and relative character; in addition to which the Plaintiff must prove the Counts in his Declaration on which his right of Action is founded; as, *ex. gr.* If the Action is Assumpsit by the Assignees of a Bankrupt, for goods sold and delivered by the Bankrupt; in addition to the proof of the regularity of the Commission, by the several necessary steps beforementioned, the Plaintiff must prove the sale and delivery of the goods, as laid down before in page 96. and the value of them.

It is here proper to notice, in addition to what was stated, how far the Defendant's *own admissions* as to his

(*r*) 1 Esp. Dig. N. P. 141. Pochin *v.* Pawley, 1 Black. Rep. 670. Unwin *v.* Wolseley, 1 T. Rep. 674, Macbeath *v.* Haldimand, 1 T. Rep. 182.

liability, either in conversation, by letter, or otherwise, are admissible, as this applies to all the causes of Action treated of.

The admission of a Party, that he owes the money for which the Action is brought, is the best Evidence that can be offered; and, if made freely and voluntarily, is conclusive: but it cannot be received, if made in a *treaty for a compromise* of the Action. (*s*) It is therefore to be attended to, under what circumstances the admission was made, so as to see whether it is admissible Evidence or not.

IV. *Of the General Evidence for the Defendant in this Action.*

In the course of the preceding pages, I have incidentally mentioned the Evidence, which the Defendant may bring forward as his defence in those particular cases. I shall now proceed to consider the particular Evidence of those matters of defence which most frequently occur, and are applicable to the Pleas in all cases in Assumpsit; and shew in what manner such Evidence should be settled, in order to furnish a complete defence.

1. *Of the Evidence under Non-Assumpsit.*

Under this Plea, every thing which *directly* disproves the Plaintiff's right of Action, either equitably or legally, may be given in Evidence: but what *collaterally* discharges it must be pleaded.

(*s*) Gunn *v.* M'Culloch, 1 Esp. Dig. N. P. 175.

As if the Plaintiff's claims arise out of, or from an illegal act, as for money charged for treating Voters at an Election, (*s*) for Stock-jobbing differences, (*t*) or any contract prohibited by law, (*u*) for an unconscientious demand, or the like, the Defendant may give in Evidence under the Plea of Non-Assumpsit what was the true consideration for the demand for which the Action is brought, which will defeat it. (*x*)

As, *ex. gr.* the Statutes having declared all securities given for money won at Play, or on an usurious contract, to be void; if the Plaintiff declares on a Bill of Exchange, or Note of Hand; the Defendant at the Trial may, under the Plea of Non-Assumpsit, give in Evidence, the true consideration for which the Bill or Note was given, and he will have a Verdict.

Such also is the case of demands which cannot be legally enforced against the Parties, as in the cases of married women or infants, where the demand is not for necessaries. The one may prove her marriage, and the other his nonage, under the Plea of Non-Assumpsit; for they cannot be said to undertake to pay that, for which by law they were not liable.

So, in the case of oppressive, unconscientious, or unjust bargains, the facts may be given in Evidence

(*s*) Ribbans *v.* Cricket, 1 Bos. and Pull. 264.

(*t*) Thwaite *v.* Warner, MS. Esp. N. P. Dig. 110. Petrie *v.* Hannay, 3 T. Rep. 418. Steers *v.* Lashley, 6 T. Rep. 61.

(*u*) Gallini *v.* Laborie, 5 T. Rep. 242. Mitchell *v.* Cockburn, 2 H. Black. 379. Booth *v.* Hodgson, 6 T. Rep. 405.

(*x*) 1 Esp. Dig. N. P. 109, 110. Cas. *passim.*

which establish them in answer to the Action; for the law will not enforce such bargains or contracts, (*y*) and therefore the Defendant cannot be said to undertake to pay for them.

So in the case of fraudulent transactions. (*z*) But in this case all the circumstances of the fraud must be clearly proved.

Lastly, it is clear, that where a Plaintiff has sued for what he gratuitously undertook to do, the Defendant on shewing that fact, may give Evidence of it under Non-Assumpsit, and defeat the Action; (*a*) for under such circumstances he could not be said to undertake to *pay*; and so in a variety of similar cases.

So the Defendant under that Plea may shew that the Action is brought too soon, as if it was for goods sold on credit, and the credit is not expired; for a man does not undertake to pay before the time of payment agreed on. (*b*)

In all these cases the facts are proved by *vivâ voce* Evidence.

Thus, the Plea of Infancy is proved, by shewing the time of the Defendant's birth. This may be done

(*y*) Jestons *v.* Brooke, Cowp. 793. Jackson *v.* Lomas, 4 T. Rep. 166.

(*z*) Willis *v.* Baldwin, Dougl. 433. Jackson *v.* Duchaire, 3 T. Rep. 551.

(*a*) Osborn *v.* Governor of Grey's Hospital, 2 Stra. 728. Hiccox *v.* Proud, MS. 1 Esp. Dig. N. P. 108.

(*b*) Vid *ante*, p. 99.

by calling his Father or Mother, or the Nurse who was present at his birth, and has known him since. So it may be proved by an entry in the Family Bible: or the Parish Register of the birth, specifying the time when the Defendant was born: and by the testimony of Persons who knew his Parents, as described in the Registry; or the hand-writing of the Father, in his Family Bible, if he is dead: but these latter pieces of Evidence should be carried further, by proof of Persons acquainted with the family, that the Defendant was the Person mentioned in the Family Bible or Register.

This Evidence is conclusive if the Plaintiff cannot answer it, but which he can do in two ways. 1. By shewing that the demand was for necessaries suited to the Infant's station and fortune in life; or,—2. That the Defendant made a new promise to pay after he became of full age.

As to giving those matters in Evidence, it must be observed, that though the Defendant may give Infancy in Evidence under the General Issue of Non-Assumpsit, he may also plead it specially. If he pleads his infancy, the Plaintiff *replies* these matters; but if the Defendant does not plead infancy, but gives infancy in Evidence at the Trial, the Plaintiff will then be at liberty to shew those matters in Evidence, though not pleaded. If, therefore, it is expected that the Defendant, although he has pleaded the General Issue, means to rely on proof of his infancy, and the Plaintiff has either of the above answers to give to it, he should be pre-

pared with Evidence to that effect to give at the Trial.

Thus, in an Action against a Defendant for a livery for a Servant and other articles, for which, as an Infant, he would not be liable; the Plaintiff proved that the Defendant was an Officer in the Army, and that such things were necessary and suitable to his rank. He was held to be liable, notwithstanding his infancy. (*c*)

The Plaintiff should be therefore always prepared with proof at the Trial, where it is expected that infancy will be set up, of the Defendant's actual or ostensible situation in life, in point of fortune and rank.

But though the Articles which are the subject of the Action may not be necessaries, if the infant after full age promises to pay, he shall be bound to pay for them, (*d*) but not beyond the extent of the promise which he gives; (*e*) as when he promised to pay half a crown in the pound on the whole debt, he was held to be bound to that extent only.

In settling the Evidence for the Plaintiff under this head, these points must be attended to: 1. That the Action is Assumpsit on simple contract. 2. What the terms of the promise to pay are; whether they were absolute or conditional: to pay the whole, or

(*c*) Hands *v.* Slaney, 8 T. Rep. 578.
(*d*) Southerton *v.* Whitlock, 1 Stra. 690.
(*e*) Green *v.* Parker, MS. 1 Esp. Dig. N. P. 198.

part of the debt. 3. That the Defendant was of full age when he made the promise.

To prove these,—1. The form of the Action is shewn by the Declaration, for an infant who has bound himself *by Bond* is not liable even on a new promise. (*f*) 2. The terms of the promise are next to be attended to; for if it was conditional, as *e. g.* to pay on the death of A. B., the Plaintiff must be prepared to prove the death of A. B.: if it was to pay part only, and the Defendant had paid that into Court, the Plaintiff if he proceeded would fail in the Action. 3. As to the actual age of the Defendant; if he was not of full age when he made it, his new promise is of no avail. But if the Plaintiff replied, "a promise made by the Defendant after full age," and the Defendant rejoined, that when he so promised he was not of full age, the Issue would lie on the Defendant to prove, that when he made the new promise he was under age. (g)

2. *Coverture* is another defence of the same description; and may also be pleaded, or given in Evidence, under the General Issue. How that is to be proved at the Trial, vid. *ante*, page 155.

3. *A Release* may be also pleaded, or given in Evidence under the General Issue in Assumpsit. (*h*) But as a Release must be by Deed, it is given in Evidence, by proving the execution of it by the sub-

(*f*) Baylis *v.* Dinely, 3 M. and S. 477.
(*g*) Borthwick *v.* Carruthers, 1 T. Rep. 648.
(*h*) May *v.* King, Cas. K. B. 538.

scribing witness; but it must appear to have been made after the cause of Action accrued, otherwise it is of no avail: that will appear by the date.

This is the effect of a Composition Deed, by which the Defendant assigns his property to Trustees for the benefit of his Creditors, and which Deed contains a Release of all Debts then due by him, and may be pleaded. (*i*) But it is also good Evidence, under the General Issue. So, though there is no Deed, the Defendant may under the General Issue give in Evidence, that the Plaintiff agreed to take a Composition, secured by collateral security, in lieu of his Debt; such as the acceptance of a friend of the Defendant's, or the like, and which was given to him: or, that the Plaintiff, by offering to come in under a Composition Deed, induced others to sign it. (*k*) These facts must be clearly proved.

4. *Payment* is good Evidence under the General Issue, for though it may be pleaded specially; (*l*) in fact it amounts to the General Issue. This may be proved by parol or by the Plaintiff's receipt; the production of a receipt proved under the Plaintiff's hand is *primâ facie* sufficient Evidence of payment; and, if given with full knowledge of all the circumstances depending between the Parties, conclusive Evidence. But when there are not those circumstances; the Plaintiff may shew what the circum-

(*i*) Drage *v.* Netter, 1 Lord Raym. 65.

(*k*) Butler *v.* Rhodes, 1 Esp. N. P. C. 236.

(*l*) Per Holt, C. J. in Brown *v.* Cornish, 1 Lord Raym. 217.

stances were, under which it was given, and that he did not receive the money at the time the receipt purports. (*m*)

Where the Defendant relies on payment, the right and appropriation often becomes doubtful; and the Rule is, That where a payment is made generally, and there are several Debts due by the Person who pays the money, he has a right to say, to which of these Debts the payment shall be applied. If he does not make a specific appropriation at the time of the payment, the right of the application of it devolves on him who receives it. (*n*) In settling the Evidence, therefore, where payment is the defence, it must be observed whether there was any direction as to the application of the money, when it was paid, if the Defendant was indebted to the Plaintiff on more accounts than one.

An *adjustment of an account* between Parties is, when in writing, an admission of payment to the extent charged: but such a settlement does not require a Stamp; and the paper may be given in Evidence without a Stamp. As where a Sailor and his Agent settled Accounts, the latter having received the other's prize money, but having paid several sums on his account, at the bottom of the account were these words signed by the Sailor, "I acknowledge the above account to be correct, and am fully satis-

(*m*) Straton *v.* Rastall, 2 T. Rep. 366.
(*n*) Simson *v.* Ingham, 2 Barn. and Cres. 72.

fied therewith:" this, it was held, required no receipt Stamp. (*o*)

5. *Usury* may be given in Evidence under the General Issue in Assumpsit: but is confined to written Instruments, as Bills, Notes, &c. This is proved, by shewing that the security was given on a transaction on which there was more than 5 per cent. reserved or received: but the transaction must be proved with all the facts, to shew that they amounted to *Usury*.

6. *If the Action is for goods sold,* the Defendant may give in Evidence under the General Issue, that they were sold on credit, which is not expired; or, as observed *ante*, p. 100. (*p*) that they were contraband or unsaleable; that they were sold by sample, from which they vary; or any ground which shews it to be unjust to charge him; or that fraud was practised on him. These are matters proveable by *vivâ voce* Evidence.

But matters of law, which go in discharge of the Action, must be pleaded, and proved as they are pleaded.

Such as,

1. *The Statute of Limitations.* This is, that six years had elapsed since the cause of Action accrued,

(*o*) Wellard *v.* Moss, 1 Bing. 134.

(*p*) 1 Esp. Dig. N. P. 112. Holman *v.* Johnson, Cowp. 341. Hodgson *v.* Temple, 5 Taunt. 181.

and before Action brought. In this case, if the debt arises under a written Instrument, in which the time of payment is specified, the limitation is ascertained by the lapse of time intervening between the time of payment and the bringing of the Action.

As if the holder of a Note payable the 1st of January 1815 was to bring an Action to recover the amount in the year 1824, the bar would appear on the face of the Note, as more than six years had run since it was due, and would require no further Evidence on the part of the Defendant.

In every case of this sort, as the time of the debt becoming due appears by the Instrument, the time of the commencement of the Suit will appear by the Memorandum on the Record, or by the production of the Writ, or of the Copy of it served on the Defendant, which he should have ready to produce, to shew the true time when it was sued out. So that if the six years had run before the suing out of the writ, he will be entitled to a Verdict.

If the debt arises from a loan of money, or is a demand arising from any thing collateral, where there is no writing to ascertain it, as on a claim for Rent, for breach of an Agreement, or the like; the Defendant should be prepared to give Evidence of the true time when the debt was due, and the demand accrued, and then of the commencement of the Suit as beforementioned, in case it should not appear accurately from the Evidence brought by the Plaintiff in support of his debt. This Evidence is therefore

composed of written and parol Evidence; written, by producing the Writ, or referring to the Record; and parol, by proof of the time when the debt accrued.

What is stated here is matter of Evidence. Where the Plaintiff joins Issue on the Plea of the Statute only, it is that the Defendant did undertake within six years; and under that Issue, the Plaintiff may rely on a new promise or acknowledgment of the debt, or he may reply process sued out to save the Statute. An *acknowledgment* by him that the debt is subsisting, deprives the Defendant of any defence under the Statute, as well as a promise to pay it, where the Issue is on the Plea; but what words or expressions used by the Defendant shall be construed to amount to either, is matter of law; and the Defendant must get accurate proof of what was said by the Defendant on the occasion of the demand. As to what shall amount to an acknowledgment or promise to pay it is sufficient to refer to the authorities *infra* (*q*); but to prove either, he must call a witness to prove the promise to pay, or an acknowledgment by the Defendant that the debt was unpaid, made at a certain time, or the Defendant's hand-writing to a letter or the like, to the same effect. So if there were Partners or several jointly liable, and the six years have run, a promise or acknowledgment by one of the Parties liable, shall be sufficient to fix them all, if the parties were all living at the time: (*r*) but if any was dead, such pro-

(*q*) In Selwyn's N. P. Ch. Assumpsit, 133, and 1 Esp. Dig. N. P. 184.

(*r*) 1 Esp. Dig. N. P. 185. Whitcomb *v.* Whiting, Dougl. 629.

mise or acknowledgment will not be sufficient to charge the Executors of him who is dead. (*s*) The nature of the promise or acknowledgment must therefore be attended to in settling the Evidence, when such is relied on as an answer to the Plea of the Statute of Limitations.

Where the Plaintiff has replied Process sued out, and which may be a latitat, Bill of Middlesex or Capias, (*t*) or a Plaint in an inferior Court, (*u*) he must produce the Writ, by which the time of suing it out will appear, and which he must shew was returned, (*x*) and if it was an *alias* the suing out of the first Writ, that it was returned, and the continuances, if any ; (*y*) for this purpose, the Writ itself must be produced, and the Plaintiff cannot give parol Evidence of the time when it was sued out. (*z*)

2. *Bankruptcy* is a good Plea in Assumpsit. (*a*)

This is either by the Defendant in chief, of his own Certificate in bar, or in abatement, that the Plaintiff was a Bankrupt.

The Evidence in support of this Plea in chief, which is a discharge of the debt due before his Bankruptcy, and which is given by the Statute, is the

(*s*) Atkins *v.* Tredgold, 2 B. and C. 23.
(*t*) Hollister *v.* Coulson, 1 Stra. 550.
(*u*) Story *v.* Atkins, 2 Stra. 719.
(*x*) Brown *v.* Babbington, 2 Lord Raym. 881. Harris *v.* Woolford, 6 T. Rep. 617.
(*y*) Budd *v.* Berkenhead, 2 Salk. 420.
(*z*) Burnell *v.* Brand, MS. 1 Esp. Dig. N. P. 189.
(*a*) 1 Esp. Dig N. P. 190.

production of the Bankrupt's Certificate only; it is not usual to call for Evidence of the Signatures to it. (*b*) The Plea of Bankruptcy goes to the Country, but the production of the Certificate though *primâ facie*, is not conclusive Evidence for the Defendant: for concluding to the Country, and the Plaintiff not being admitted for that reason to reply the special matter, which would defeat it, he is forced to join Issue; (*c*) he may therefore give in Evidence the several matters before stated page 150, 1, which defeats the operation of the Defendant's Certificate. (*d*) But the Defendant must shew that the debt for which the Action was brought was a debt due before he became a Bankrupt. If there is likely to be any doubt about this, the Defendant should be prepared to prove it. The time when the debt became due will probably be ascertained by the Plaintiff's Evidence of the demand: but, in case of doubt, the Defendant should be prepared to prove the true time. The Proceedings under the Commission will shew when the Defendant became Bankrupt.

If the Plea is in Abatement "that the Plaintiff was a Bankrupt;" that must be proved by the production of the Proceedings under the Commission under stat. 49 Geo. 3. 121: but the assignment of the Commissioners must be proved by the subscribing witness; for it is that which takes all the property out of the Bankrupt. (*e*)

(*b*) Ludford *v.* Barber, 1 T. Rep. 86.

(*c*) Trueman *v.* Fenton, Cowp. 544. Besford *v.* Saunders, 2 H. Black. 116.

(*d*) Hughes *v.* Morley, 1 B. and A. 22.

(*e*) Cary *v.* Crisp, Salk. 108.

3. *A Tender* must be pleaded. (*f*)

Under this plea, the Defendant must prove the offer of the sum, and as stated in his plea, tendered in money, by shewing the actual production of the sum, either in specie, or in a bag or purse, which he must prove contained that sum; this should be done by a witness who tendered it to the Plaintiff, or saw it tendered (*g*) and that the sum tendered was the same which is mentioned in the Plea, or a greater, if it was in monies numbered, or in Bank-notes. But if it was in Notes, that the Defendant made no objection; for if the Tender is in Bank-notes, and they exceed the sum pleaded to be tendered, that Tender is bad. The same rule appears to apply to a Tender in money, and that the Tender should properly be of the exact sum; for it is doubtful, whether the Tender of a sum beyond that which is admitted to be due with a demand of the difference in change, is good. It has been held not to be good, if qualified by any circumstance; as when seven sovereigns were tendered to cover a demand of 6*l.* 17*s.* 6*d.* accompanied by a counter demand in writing, and the offer was "take your demand," this was held to be bad. (*h*)

In settling the Evidence therefore, it is always the safe course, to have proof, of the Tender of the exact sum, to which the Defendant admits that the Plaintiff is entitled: and if the Issue is on a subsequent demand and refusal, the Plaintiff must prove a demand

(*f*) 1 Esp. Dig. N. P. 194. Wade's case, 5 Co. 114. Holland *v.* Phillips, 6 Esp. N. P. C. 46.

(*g*) Per Le Blanc Just. in Betterbee *v.* Davis, 3 Campb. 70.

(*h*) Brady *v.* Jones, 2 Dowl. and Ryl. 305.

of the exact sum tendered. (*i*) In every case the sum tendered must be produced in money or Bank-notes, so that the Plaintiff, if he pleases, may count it, and take it if he wishes to do so, unless he refuses to take it; as, if he says, "You need not produce it, I shall not accept it." (*k*) But in that case, the Defendant must be able to prove, that the person had the money ready to pay, if the Plaintiff would have accepted it, though he did not produce it: and a Tender to an Agent, or to a Person sent for the money who is authorized to receive it, is good: (*l*) but if the Defendant relies upon a Tender which he has made to an Agent, or such person, he must prove that they were authorized to receive it; as to the Attorney (*e. g.*) or to a person sent by the Plaintiff who demanded the money of him on the part of the Plaintiff. (*m*) For which purpose, the Agent, Attorney, or Person sent for the money, would be good witnesses.

4. A *Set off* is a good plea in Assumpsit, or in Debt: but it may also be given in Evidence where the General Issue is pleaded, where notice has been given by the Defendant, that he will give a *Set off* in Evidence.

A Set off arises in cases of mutual debts or credits; and as it is a claim on the part of the Defendant from the Plaintiff of a debt due to him, the same Evidence is required on the part of the Defendant to establish his Set off, as a debt would be necessary if he was

(*i*) Spybey *v.* Hyde, 1 Campb. 181.
(*k*) Dickinson *v.* Shee, Peake, N. P. C. 88.
(*l*) Goodland *v.* Blewith, 1 Camp. 477.
(*m*) Read *v.* Goldring, 2 M. and S. 86.

Plaintiff, to establish his demand. As, *ex. gr.* if the Defendant sets off a debt, due by the Plaintiff to him, for goods sold and delivered, he must prove the sale, delivery, and value of the goods to the Plaintiff, by the mode of proof which would be required, if he was the Plaintiff. If he claims a Promissory Note of the Plaintiff's as a set off, he must prove the Plaintiff's hand-writing subscribed to it; and if it was a Note indorsed to him to establish a similar demand from him by the Plaintiff, he must prove the Indorser's and others' hand-writing; and the same Evidence as is stated *ante,* p. 25. when the Action is by the Indorsee against the Indorser; and so in other instances.

It does not belong to this Treatise to state what debts can or cannot be set off; that belongs to elementary books. (*n*) It is sufficient to observe, that what can be set off, must be an existing and liquidated *debt,* and not damages; and such as can be recovered, as a debt at law: but every description of debt of whatever nature it may be, as by simple contract, Bond, Judgment or Record, are all objects of set off, and must all be proved in the same way as if the Plaintiff had declared on them. As if a Bond be set off, the subscribing witness must be called to prove the execution of it. (*o*) If a Judgment be set off, it must be proved by a witness producing a copy examined with the Record. (*p*)

(*n*) Vid. Cases in 1 Esp. D. N. P. 263 to 268 *passim.* Howlet *v.* Strickland, Cowp. 57. Weigall *v.* Waters, 6 T. Rep. 488.

(*o*) Baskerville *v.* Brown, 2 Burr. 1229. Thrustout *v.* Carter, 2 Black. R. 826.

(*p*) Baskerville *v.* Brown, 2 Burr. 1229. Crawford *v.*

But when the Defendant has proved his Set off, the Plaintiff is at liberty to impeach it, in the same way, as if he was sued by the Defendant: as, he may shew that the debt which the Defendant claims to be due to him, was barred by the Statute of Limitations, and this he must prove as *ante,* page 173. but he cannot do this on Issue joined, denying the Tender; he must *reply* it if the Defendant *pleads* a Set off, and then he may go into proof of it. (*q*) But on a *notice of Set off,* he may avail himself of it at the Trial. (*r*) So he may shew, that the money which the Defendant claims as a debt, was paid to him voluntarily, as for such no Action will lie, *ante* page 93. that the debt he claims from the Plaintiff was not due to him alone, but to him and his Partners, *ante,* page 133: but if he was a surviving Partner it is good. (*s*) That he received it for an illegal purpose, *ante,* page 92. In short, that it is a debt for which no Action could be sustained by the Defendant against him. So he may shew, that the debt claimed was due to him in right of his wife. (*t*) To the proof of all which matters, in settling the Plaintiff's Evidence, attention must be paid.

5. *Foreign attachment* is also a good Plea. *Vide post,* Chap. *of Debt.*

Stirling, 4 Esp. N. P. C. 207. Fletcher *v.* Dyke, 2 T. Rep. 32. Bull. N. P. 180. Wake *v.* Tinkler, 16 East. 36. Grove *v.* Dubois, 1 T. Rep. 112. Slipper *v.* Stidstone, 5 T. Rep. 493.

(*q*) Hicks *v.* Hicks, 3 East, 16.

(*r*) Bull. N. P. 180.

(*s*) Slipper *v.* Stidstone, 5 T. Rep. 493. French *v.* Andrade, 6 T. R. 582.

(*t*) Painter *v.* Walker, Bull. N. P. 179.

6. *A Judgment recovered* by the Plaintiff against the Defendant for the same cause of Action, is also a good Plea in this Action. (*u*) In settling the Evidence under this Plea, the Defendant must give in Evidence an examined Copy of the Judgment in the first Action: he must then prove that the cause of Action was the same. For this purpose, the best Evidence is, to shew by witnesses who happened to be present at the first Trial, and heard the Evidence given at it, that it was the same as that given at the second Trial. So he may shew, thát there was but one cause of Action existing at the time of the first Trial, and of the second.

(*u*) Hitchen *v.* Campbell, 3 Wils. 240.

CHAPTER III.

OF SETTLING THE EVIDENCE IN THE ACTION OF DEBT.

THE Action of Debt is maintainable either on simple or on special contract, or on matter of Record. I shall, therefore, first consider the Evidence as it applies to the contract or security; secondly, as it applies to the Person.

1.—*Of settling Evidence in Debt as it applies to the contract.*

Debt on simple contract, in respect to the Evidence, differs nothing from the Action of Assumpsit; and the Rules for settling the Evidence, under the head of money lent, goods sold and delivered, and the other Counts founded upon contract in that Action, are in every respect the same; and where the Action is Debt, may be referred to.

Debt on special contract is,—1. For money due on Bonds.—2. For Rent reserved by Deed.—3. On matters of Record. These constitute the principal heads, and will be treated of in their order.

I. *Of the Evidence in Actions of Debt on Bond.*

These are principally on Bonds for the payment of

money only : Bail-Bonds : Bonds of indemnity : Bonds for performance of Covenants : Bonds to secure the payment of Annuities : and Arbitration Bonds.

The Declaration in Debt on Bond states, "That the Defendant by his writing obligatory bearing date, &c., became bound to the Plaintiff in £—— to be paid to the Plaintiff or his Assigns,&c." The breach is, "That he had not paid, &c;" and Profert of the Bond is made in the Declaration.

The General Issue is "*Non est factum.*"

In every case of Debt on Bond, the Plaintiff is bound at the Trial to *produce the Bond itself* when he has declared with a Profert, and no secondary Evidence will be admitted, such as a copy, though the original is proved to be lost; and this has been carried so far, that in one case where it was proved that the Defendant had taken away the original, and said he had burned it, yet secondary Evidence was refused. (*x*) In cases, therefore, where the original is lost, the Plaintiff should not declare with a Profert; but state the Bond "to be lost by time or accident," or "to be in the Defendant's possession." That excuses the Profert; and the Plaintiff may in that case give an authentic Copy in Evidence.

But before he can go into this secondary Evidence, of a copy, he must prove the Bond to be lost or de-

(*x*) Smith *v.* Woodward, 4 East. 585.

stroyed: this is done either by giving Evidence of the actual loss of it, such as its being burned, *e. g.* or by proving that search has been carefully made among the Party's papers, or where it was likely to be found, and that it could not, but appears to be lost. The Copy then produced must be proved to be an authentic one by a person who copied it, or examined the Copy with the Original. If the original witness to the Bond can be had, he should be called for that purpose, as he can best state what the Bond was.

If the Bond is produced, it must be proved by calling the subscribing witness to prove the execution of it by the Defendant, and the delivery of it as his Deed. (*y*)

The Rule must be taken as general, that the subscribing witness must be called to prove the execution of it in all cases, that is, if his attendance can by any possibility be procured: but if this, as it sometimes happens, cannot be done; the Courts admit inferior Evidence, that is, proof of the hand-writing of the subscribing witness, or of the Obligor of the Bond. In settling the Evidence, therefore, those cases are to be attended to, as exceptions to the general Rule. But in *all cases*, the Plaintiff, where he does not call the subscribing witness, must account for, why he does not do so, (*z*) as by calling a witness to prove his having used exertions to get him subpœnaed,

(*y*) Bull. N. P. 254.

(*z*) Abbott *v.* Plumbe, Dougl. 205. Talbot *v.* Hodson, 7 Taunt. 251.

and proving the circumstances respecting the witness, as the reason why he is not brought forward.

The Courts have, however, admitted Evidence of the hand-writing of the witness and of the obligor, as proof of the execution of the Bond in the following instances:—(*a*)

1. Where the witness was proved to have *gone abroad,* and to be so at the time of the Trial, so as not to be amenable to the process of the Court; as if an Officer or Sailor is absent on service, *ex. gr.* or there is any other cause to account for his absence: but full proof of both facts is required (*b*)

Where the fact is, that the witness to the Bond was an Officer or Seaman, then on board a King's Ship, and on a foreign station. The Muster Roll of the Crew can be had at the Admiralty, in which the name of the witness appears, and at the same place, Evidence of its station abroad, can be had and given at the Trial.

So if the witness is in the public Service abroad, it can be proved by Evidence from the Office of the Secretary of State.

If the witness is a private Individual, some of his family may be called to prove the fact of his not being in the Kingdom;—as *e. g.* by receiving Letters from him from abroad.

(*a*) 1 Esp. Dig. N. P. 282.

(*b*) Coghlan *v.* Williamson, Dougl. 89. Barnes *v.* Trompowski, 7 T. R. 265. Falconer *v.* Hanson, 1 Campb. 171. Crosby *v.* Percy, 1 Taunt. 364. Parker *v.* Hoskins, 2 Taunt. 223.

2. Where it was proved, that the witness had *absconded*, and could not be found: as if the case was that he had absconded to avoid his Creditors; (*c*) or had not surrendered to his Commission, though declared a Bankrupt. These facts must be proved, as if he was a Bankrupt, the Gazette will shew, when he was declared a Bankrupt, and the Solicitor under the Commission can prove that he never surrendered; this will account for why he is not brought forward: but, in all such cases, it must be taken to be indispensable, that Evidence be given of diligent inquiry at the places where the witness had been known to reside or frequent, and inquiries made of Persons to whom he was known, (*d*) for the purpose of subpœnaing him, to prove the execution of the Bond at the Trial, and which must be done by the witness who made the inquiries.

In fact, the Rule requiring the calling the subscribing witness in all cases, must be strictly attended to: but where, from any circumstances, it is proved, that after very diligent search and inquiry, the witness is dead, or cannot be found, secondary Evidence, that is, of his hand-writing, is admitted. Such is also the case where, though he can be found, he is from circumstances inadmissible.

Whether in admitting secondary Evidence of the execution of a Bond, proof of the hand-writing of the witness alone was sufficient, or that it was also necessary to prove the hand-writing of the obligor,

(*c*) Cunliffe *v.* Sefton, 2 East. 183. Crosby *v.* Percy, 1 Campb. 304. 1 Taunt. 364. S. C.

(*d*) Wardell *v.* Fermor, 2 Campb. 282.

had been previously doubted. But it seems to be now agreed that it is not necessary to prove the latter, where that of the subscribing witness is proved. (*e*)

But where the Bond is thirty years old, the mere production of it is sufficient, and no proof of its execution is required. (*f*) Some Evidence should however be given of the place it came from, as *e. g.* to shew that it was found among the obligee's papers. (g)

As to the admissibility of Evidence, these points are to be observed, in proving the execution of Bonds and other Deeds.

1. If there is no subscribing witness, it is sufficient for the Plaintiff to prove the hand-writing of the Defendant or his admission. (*h*) This may be done by a witness acquainted with his hand-writing, or by one who has heard him admit that it was so.

2. If the subscribing witness is *proved to be dead*, proof of his hand-writing is sufficient; and if there are two subscribing witnesses, one dead, and the other beyond the sea, proof of the hand-writing of him that is dead is sufficient. (*i*)

If the death of the witness is set up as the reason of no witness being called, to prove the execution

(*e*) Selw. N. P, Title Debt, p. 534. and Cas. *ib.*
(*f*) Bull. N. P. 255.
(*g*) Chelsea Waterworks *v.* Cooper, 1 Esp. N. P. C. 275.
(*h*) Ley *v.* Ballard, MS. 1 Esp. Dig. N. P. 282.
(*i*) Henley *v.* Phillips, 2 Atk. 48.

of the Bond, the Plaintiff must prove, that the person whose name is on the Bond as subscribing witness is dead; and that the hand-writing subscribed was the hand-writing of that person when living. The fact of his death must be proved, and that the hand-writing was his, clearly established.

3. Where from change of circumstances he has *become a Party on the Record:* as if the Obligee had made the subscribing witness his Executor, and he brings the Action as such: this fact being established, Evidence of his hand-writing will be sufficient. (*k*)

But to prove this fact, the Probate of the will must be produced, as the best Evidence; and the Person who has proved the will as Executor be identified to be the same person as he who is witness to the Bond.

4. Where the witness *has become infamous* from a conviction, and therefore inadmissible, proof of his hand-writing will be sufficient. (*l*)

This can only be done by producing the Record of the judgment or conviction of the witness for some criminal offence, making him infamous in the eye of the Law; such as forgery, perjury, and the like. And for this purpose a Record of the con-

(*k*) Godfrey *v.* Norris, 1 Stra. 34.
(*l*) Jones *v.* Mason, 2 Stra. 833.

viction only, without the Judgment, is insufficient. For the Judgment might have been arrested; (*m*) and even the admission of the witness himself, that he was in prison under a Judgment for grand Larceny,(*n*) or had been guilty of perjury on another occasion, will not make him incompetent. (*o*)

5. If a *fictitious name* is put to a Bond as a subscribing witness, on proof that it is so, it will be sufficient to prove Defendant's hand-writing. (*p*)

This may be proved, by shewing inquiries to have been made for such person, and that no one of that name was heard of or known, where the parties to the Bond resided.

And this rule, requiring the subscribing witness in all cases to be called where he can be procured, (*q*) is carried so far, that the obligor is not suffered to admit his own hand-writing, and the execution of the Bond; and even when on an examination on oath, he admitted it in a Deposition before Commissioners of Bankrupts, such Deposition was not allowed as Evidence of his execution of it. (*r*)

2. *Of the Evidence in Debt on Bail Bonds.*

As the Bail Bond is given to the Sheriff by the Defendant in the Action, with two sureties, the Action

(*m*) Rex *v.* Inhabitants of Castell Careinion, 8 East, 77.
(*n*) 8 East, 78. S. C.
(*o*) Rex *v.* Teal, 11 East, 309. Rands *v.* Thomas, 5 M. and S. 246.
(*p*) Fassett *v.* Brown, Peake's N. P. C. 23.
(*q*) Abbot *v.* Plumbe, Doug. 205. Call *v.* Dunning, 4 East. 53.
(*r*) Call *v.* Dunning, 4 East. 53.

may be against the original Defendant, or against the Bail. If the Action of Debt is on the Bail Bond against the Bail, it is either by the Sheriff, to whom it is given, or by the Plaintiff as Assignee of the Sheriff, under the Stat. 4 of Anne. c. 16. The Declaration, if by *the Assignee,* sets out the issuing of the Writ in the original Action; the delivery of it to the Sheriff; the arrest of the Defendant; that the Defendant in the present Action became Bail to the Sheriff, by Bond conditioned for the Defendant's appearance at the return of the Writ; that the Defendant did not appear according to the condition of the Bail Bond; and, lastly, the assignment of the Bond by the Sheriff to the Plaintiff.

The several matters of defence to this Action are available for the Defendant, under these Pleas of 1. *Non est factum.* 2. That there was no process, or no such process in the original Action, as stated in the Declaration. 3. That the Bond was taken for ease and favour after the return of the Writ contrary to Stat. 23 H. 6. c. 9. 4. *Comperuit ad Diem.* 5. That the Sheriff did not assign the Bond according to the form of the Statute. These are the principal Pleas.

And, first, if the Plea is *Non est factum,* only, the Plaintiff need only prove the *execution of the Bail Bond itself* by the subscribing witness, in the way laid down before, with respect to Bonds in general; for though the Declaration contains many averments, and the title to sue is derived from the assignment by the Sheriff in pursuance of the Statute, and as that

is by Indorsement only, and not by Deed, the only *Deed* mentioned in the Declaration is the Bail Bond, the Plea of *non est factum* therefore applies to it, and it is the only Issue on the Record; so that the execution of it being proved by the subscribing witness, the Plaintiff is entitled to a verdict. (*r*)

1. And under *non est factum,* the Defendant may shew, that the Bond is void on the face of it, as where it bears date after the return of the writ, (*s*) or was executed before the Condition was filled up. (*t*)

It is, however, not unusual, as a trick in this Action, to plead *nil debet;* it is a bad Plea in law, and should be demurred to: but if suffered to stand, and Issue is joined on it, in that case the Plaintiff is bound to prove every averment in the Declaration, *viz.* the issuing of the Writ, the arrest of the Defendant, the Execution of the Bond, and the assignment by the Sheriff.

2. If the Plea is *That there is no such Writ, &c.,* the Plaintiff, if he joins issue on that Plea, must produce the writ, and if the writ when produced varies from that stated in the Declaration, it will befatal; as if the Plaintiff declared on a writ returnable in Easter, and it appeared to have been returned inHilary Term, for the Bail Bond on which the Action was brought would appear to be misdescribed. In this case, therefore, the Plaintiff in settling the Evidence should carefully compare the averment in

(*r*) Hutchinson *v.* Kearns, MS. Selw. N. P. 574.
(*s*) Thompson *v.* Rock, 4 M. and S. 338.
(*t*) Powell *v.* Duff, 3 Campb. 181.

his Declaration with the Writ or copy of it, which he means to give in Evidence; and if he finds a variance, get it amended by a Summons before a Judge, which, if he cannot do, he must abandon the Action.

3. If the Plea is, "That the *Bail Bond was given for ease and favour,*" the true time of the execution of it must be given in Evidence by a witness, who was present at or knows the fact of the execution of it; and if that was after the return day of the writ, it will be good Evidence to defeat the Action, the Bond being given contrary to the stat. 23 H. 6. c. 9.

4. If the Issue is on the Plea of "*Comperuit ad diem.*" That is, that the Defendant, in the original Action, did appear at the day of the return of the Writ. This it should seem may be proved by shewing that the Defendant did appear, that is, put in special Bail to the Action; for which purpose the Bail piece is Evidence as to the time; and the rule for the allowance of Bail, is Evidence of the Bail being perfected. But *quære,* as there is a Plea verifying by the Record. (*u*)

5. If the Issue is, "*That the Bail Bond was not regularly assigned by the Sheriff:*" That, the Plaintiff's Attorney should look to in settling the Evidence, and that it has been done as is directed by the stat. 4 and 5 Ann. c. 16. It must be assigned by writing under the hand and seal of the Sheriff, and be attested by two witnesses, and must be stamped before Action brought. (*x*)

(*u*) Vid. Tebbut *v.* Bowles, Lilly. Ent. 498.

(*x*) Dawes *v.* Papworth, Willes Rep. 408.

3. *Of the Evidence in Debt on Bonds of Indemnity, or Bonds for performance of Covenants.*

If the Bond sued on is *an Indemnity Bond,* or *for performance of Covenants,* so that no specific sum of money appears to be due on the face of it, but it is to be ascertained by the damages to be found by a Jury on the breaches assigned, where *non est factum* has been pleaded, or the Plaintiff has had judgment on Demurrer, in which cases, the Plaintiff must suggest and assign breaches under stat. 4 and 5 Wm. III. ch. 11. These were usually set out in the Replication, after oyer of the condition of the Bond: but the course now is, for the Plaintiff to set out the condition of the Bond and assign the breaches, in his Declaration. But if the Plaintiff declares generally on the Bond, and the Defendant craves oyer of the condition, if he pleads " performance," or " that if the Plaintiff was damnified it was his own fault," or "*non damnificatus,*" only, in those cases, as the Defendant has not pleaded *non est factum,* the execution of the Bond is admitted, and the Evidence of the Plaintiff is confined to the proof only of the breaches which he has assigned: but if the Plaintiff sets out the breaches in his replication, the Defendant must plead to them.

But if in addition to these Pleas, *non èst factum* is pleaded, the Plaintiff must prove the execution of the Bond; and then give Evidence of the breaches, as suggested and set out either in the Declaration or Replication.

As if the Bond was to indemnify a Party who had taken a Clerk into his service, and the condition was for his faithful service, and " accounting for all monies

of the Plaintiff's which he should receive," and the Plaintiff assigns a breach, " that the Clerk received from A. B. a certain sum of money belonging to him which he had not accounted for." He must call A. B. or some other witness, to prove that A. B. paid him such a sum of money on the Plaintiff's account; and it then will lie on the Defendant to prove that the Clerk did account for it.

The rule as to settling the Evidence is the same, if the Plaintiff has Judgment on demurrer, in which case also the breaches are suggested.

If a *Surety* is sued on a Bond in which he has joined for another; he may give in Evidence, that the Creditor entered into an agreement with the Principal, *not to sue him* for a given time, but to allow him further time to pay the money, *without the concurrence of the surety*; for the Creditor by such means has put it out of his own power to enforce immediate payment, when the Surety would have a right to require him to do so. (*t*)

But shewing laches in the Creditor, in not calling on the Principal for payment within a reasonable time, will afford a Surety no defence. (*u*)

Under this head falls the case of Bonds given to Parish Officers to indemnify the Parish against bastard children. These Bonds by stat. 54 Geo. III. c. 170. are vested in the Parish Officers for the time being; and as the Bonds are made to the persons who were

(*t*) Bank of Ireland *v.* Beresford, 6 Dow. 233.

(*u*) London Assurance Company *v.* Buckle, 4 Moore, 153.

Officers when the Bond was given, and who are the obligees, upon proving the Bond, Evidence must be given that the Plaintiffs on the Record were the Overseers when the Action was brought. That is done by producing the Act of Vestry, and proving their acting. (*x*)

4. *If the Bond is for performance of Covenants* in a Lease or Indenture, the breaches assigned are the breaches of the Covenants in the lease. In that case, the Plaintiff must produce and prove the execution of the Lease, or Indenture of Demise, as well as of the Bond, by the subscribing witness, if *non est factum* is pleaded; and then give Evidence as to the Covenants broken, by calling a witness to prove the facts. He must then prove the sum at which he estimates his damages.

5. *Of the Evidence in Debt on Annuity or Post Obit Bonds.*

If the Action is on an *Annuity Bond or Deed* to which *non est factum* is pleaded, and is brought to recover arrears of the Annuity, the Plaintiff's Declaration sets out, that so much, as *e. g.* an half year or quarter, is due and unpaid to him. He must be prepared to prove the execution of the Deed; and also that the Grantor, or person for whose life the Annuity was granted, is living, and then what arrear is due.

If the Action is on a *Post Obit Bond*, the Plaintiff must prove that the person is dead on whose death it became due.

(*x*) Addey *v.* Woolley, 3 Moore, 21.

If the Defendant in either of these cases pleads "*Riens en arrere*" only, he admits the execution of the Bond, and the Issue lies wholly on the Defendant to prove payment.

6. *Of the Evidence on Arbitration Bonds.*

If the Action is on a Bond for the performance of an Award, or on the Award itself; the Plaintiff must prove the Defendant's execution of the Bond by the subscribing witness; and then the Award must be produced, and the execution of it by the Arbitrator, be also proved. If there is a subscribing witness to it, he should be called to prove it: if there is any thing in the Award, which the Plaintiff was required to do previous to his suing for the money awarded, he must prove by a witness that he has done it: and he should, lastly, prove a demand of the money from the Defendant, or, that he attended at the place where the Arbitrator had directed it to be paid, and that no one attended to pay it. (*y*)

If the Award has been made, under a Reference *by a Judge's order*: by an order of *Nisi Prius*: or by *a Rule of Court*: *the production of them* is sufficient Evidence, and the subsequent Evidence is the same as above stated, where it is by Bond: that is the Judge's order: the original Rule of Court and order of *Nisi Prius* should be produced, and given in Evidence without further proof.

Awards are rarely made, but under a written au-

(*y*) Everard *v.* Patterson, 2 Marsh, 304.

thority given to the Arbitrator, by some of the ways mentioned: but a good Award may be made under a parol agreement to refer the matters in difference to a third person, and shall bind the Parties; for breach of which an Action of *Assumpsit* will lie. (z)

A Party to an Arbitration by Bond may by a Counter Bond, and notice to the other Party and to the Arbitrator, *revoke his authority*, and put an end to the arbitration. (a) If he has done so, and yet the Arbitrator proceeds, he may plead the special matter; and he must then give in Evidence the latter Bond revoking the former, by proving his execution of it by the subscribing witness, and Copies of the notice of revocation served on the opposite Party and the Arbitrator, by the witness who served them.

7. Bonds are suable against *the Heir, Executor, or Administrator,* of the Obligor. Where such an Action is brought; in addition to proving the Bond, in which it must appear from the words, that the Obligor bound his Heirs, Executors, or Administrators, the Plaintiff may be put to prove the Defendant to be Heir, Executor, or Administrator to the Obligor. That is the case, where the Defendant pleads that he is not Heir, Executor, or Administrator; for if he pleads any other plea, he admits that he is sued by his proper designation and title. Proof that the Defendant is Heir to the Obligor, is made out by calling a witness who knew the Obligor and his fa-

(z) Matson *v.* Trower, Ryan and M. N. P. C. 17.
(a) King *v.* Joseph, 5 Taunt. 452.

mily, and that the Defendant is his Heir at law: but it may also be done, by proving that he was in possession of the fee-simple land of the Obligor, who is dead, and general reputation that he was heir at law. If the Defendant is sued as Executor or Administrator, and he pleads *Ne unques Executor*, or *Administrator*; if the Defendant is Executor, a notice should be given to him to produce the Probate. If produced, it establishes the Plaintiff's Issue: but if not, it will be sufficient for the Plaintiff, to prove the Defendant's taking possession of the effects of the deceased, and dealing with them as his own, (*b*) which makes him Executor *de son tort*. Or it is proved by the Statute Book from the Commons, in which are the entries of Probates and Administrations; or the *original Will* from the Commons should be produced by an Officer of the Court. (*c*) If it is the original Will which is produced, there should appear to be the Indorsement usual on it, " that Probate had been granted to the Defendant. His identity as the Party mentioned should be proved: but that may be done by proving any act of his in the Testator's affairs.

If the Issue is on the Defendant of his being Administrator; that is proved, by giving him notice to produce the Letters of Administration; or if not produced, by the original Book of Acts from the Commons, which directs the grants of Letters of Administration, with the Surrogate's *fiat*, (*d*) or by an Examined Copy

(*b*) Toller on Executors, *ch*. 2. 132.

(*c*) Davis *v*. Williams, 13 East. 234. Gorton *v*. Dyson, 1 Brod. and Bing. 219.

(*d*) Elden *v*. Keddell, 8 East 187. *Per* Bayley J. in Ramsbottom *v*. Buckhurst, 2 M. and S. 567. Phillips on Evid. 378.

of it. In settling the Evidence on these Pleas, the above Evidence must be had and given.

For the Pleas in bar by the Heir, Executor, or Administrator, see post 219 in this Chapter.

II. *Of the Evidence in Debt for Rent.*

This Evidence is different where the Plaintiff declares *on a Lease*, in debt for Rent generally on it, or on a *parol demise*; for in both cases, the Declaration may be general, that is, the Declaration may state the demise, the term, the rent reserved, the Defendant's entry on the premises as Tenant, and the Rent in arrear; and give the lease in Evidence in support of these averments. (*e*)

If the Action is Debt for Rent reserved by Lease, and *Non est factum* is pleaded: the Plaintiff has only to prove the execution of the lease by the subscribing witness, and state how much Rent is in arrear. If he goes for more than is due, the Defendant may prove the Rent really due, by shewing up to what time he last paid; and where the Defendant holds under a Lease or Indenture of Demise, the Plaintiff is not required to prove any actual entry or occupation by the Defendant. (*f*)

But if the Declaration is general as before stated, and the Defendant pleads *nil debet*, whether the Demise was by parol or not, the Plaintiff must prove the Demise, the term, the reserved Rent, and the occupation. If there was a Lease, the Demise and

(*e*) Duppa *v.* Mayo, 1 Saund. 276. *n.*
(*f*) Bellasis *v.* Burbrick, 1 Salk. 209.

the rent reserved are proved, by proving the execution of the Lease in which they are stated: if the Demise was by parol, they must be proved by witnesses. The occupation as Tenant, is a matter of fact to be proved by witnesses, and that being proved and the reserved Rent, the time of the Defendant's occupation is the extent to which the Plaintiff will be entitled to recover. Payment is the best answer to it under this Issue.

If the Defendant plead *riens en arrere,* the Issue lies upon him, and he must prove, as under the Plea of *nil debet,* payment of the rent up to the time claimed by the Plaintiff. This he may do, either by production of the receipt of the Plaintiff for the Rent, or by a witness who saw it paid.

If the Defendant pleads, as he may well do in bar, *That he assigned his Lease to another, whom the Plaintiff accepted as his Tenant, and received Rent from him;* he must prove the execution of the deed of assignment to such person, and he may be called to prove, that the Plaintiff accepted him as his Tenant, and received Rent from him (g) as *assignee* of the lease, or it may be proved by any other witness who knows the fact.

Eviction is a good defence to this Action: but if the Defendant sets it up, it must be such as deprives him of the enjoyment of the Premises demised.

If the Action is Debt *under the Stat. 4 Geo. II. c. 28. for double the value of the Premises* which the

(g) 2 Saund. 297, 298.

Defendant held as Tenant to the Plaintiff, and held over after notice; the Plaintiff must prove the antecedent Tenancy of the Defendant to him as Landlord, and when his Tenancy regularly ended: that he had notice to quit, which corresponded with his holding, that is, if his Tenancy expired at Michaelmas, that the notice did so too: this must be proved by the Person who served the notice to quit on the Defendant, the Tenant; and the Defendant should have notice to produce the original. The Plaintiff should also, regularly prove a demand by him of the possession *on the expiration of the notice to quit,* which should be in writing, and proved at the Trial. The notice to quit has been held to be a sufficient demand in the case of Williamson *v.* Colley, 5 Burr. 2694. under the Statute: but as the word *demand* is used in the Statute it is always prudent to make it, to shew that the Defendant did not afterwards deliver up the possession; and, lastly, the value of the Premises to let. The Rent reserved is usually taken as the value: but the Plaintiff is not bound by it, and may bring witnesses to prove the actual value, which in the cases of old Leases usually much exceeds the reserved Rent.

In defence to this Action, the Defendant may shew; that in refusing to quit pursuant to notice, and contesting the Plaintiff's right to recover possession; he acted under the belief that he had a legal title to the possession of the land, and of course a good defence to the Action; for the double value is given in cases only, under the words of the Statute, where the holding over *is wilful,* that is, where the tenant holds over, knowing that he has no title to do so. He may there-

fore give in Evidence, the grounds on which he defended the Action brought by his Landlord. As where the Plaintiff was a Person in remainder, and the Defendant had a Lease regularly executed by the Tenant for life, who had a power to make Leases, but to which he had not conformed in making the Lease to the Defendant, and on his death, the remainder-man brought an Ejectment to break the Lease: as the leasing power was a matter necessarily unknown to the Tenant, and he had a Lease which appeared *primâ facie* a valid one, his defence to the Ejectment, was held not to be a wilful holding over under the Statute (*h*)

If *the Action is under the Stat.* 11 *Geo. II. c.* 19. to recover *double Rent after a notice to quit given by the Tenant:* the same Evidence of Tenancy must be given as above stated in Actions on Stat. 4 Geo. II. c. 28. The Plaintiff must then produce and prove the Defendant's notice of quitting; by proving the service of the notice on him and the Defendant's hand-writing, if his name is subscribed to it, or that it was given and served by his authority. He must then prove, that the Tenant did not quit at the time specified in the notice, but remained in possession after it; and, lastly, the yearly Rent under which he held.

If the Action is Debt, *for three years' Rent of* the Premises, given by Stat. 11 Geo. II. c. 19. by reason of the Tenant's not having *given notice of an Ejectment* served on him, by which there has been a recovery in Ejectment: the Plaintiff must prove, that the

(*h*) Wright *v.* Smith, 5 Esp. N. P. C. 203.

Defendant was his Tenant; and that an Ejectment was served on him. This Evidence must be had from the Lessor of the Plaintiff, or rather from his Attorney, by a *subpœna duces tecum* of the Declaration and proceedings in Ejectment, and by calling the Person who served the Declaration in Ejectment on the Tenant, (the Defendant;) this witness may be found out by examining the Affidavits filed with the Clerk of the Rules for Judgment against the casual Ejector, if not otherwise to be found out; and, lastly, the Judgment in Ejectment, and the Writ of Possession if executed; the former by an examined copy of it, the latter by proving a Warrant made out on the Writ of Possession to the Sheriff's Officer, who must have a *subpœna duces tecum* of the Warrant, and prove that he had executed it, or the Sheriff's return on the *habere*.

If an *Assignee of the reversion* brings debt for Rent, he must prove all the assignments from the original Lessor down to himself, for they are stated in the Declaration, and call the subscribing witnesses if by Deed. If any are by Will, he must prove the Will, or if the Lessor was himself only Tenant for years, Probate of his Will will be sufficient.

In Debt for Rent, not under Seal, the Evidence is the same as in Assumpsit for Use and Occupation, *ante*, p. 57.

III. *Of the Evidence in Debt on matters of Record.*

1. *On Recognizances of Bail.*

In Debt on the Recognizance against the Bail, the Evidence where there is an Issue which goes to the

Country, lies on the Defendant, and depends on the Plea. (*i*) The Recognizance itself is matter of Record; and if the Defendant pleads *nul tiel* Record, it is tried by the Court: but he may plead to the Country, the Pleas of "*payment*," a "*render of the Principal in due time*," "*the death of the Principal*," or "*no ca. sa.*" The first is a matter of fact to be proved, as before stated, in the case of payment: if he pleads a *render*, it is, that the Principal was surrendered in due time; for the Bail would not be liable, if the Principal had either been taken under the *ca. sa.*, or had surrendered himself in discharge of his Bail, or been surrendered by them in due time. This Plea therefore means, that the Defendant for whom he became Bail above, was in Custody on the return of the *ca. sa.*, and it is good and sufficient, if proved. To do this the Defendant must give in Evidence, the Book of the Marshal of K. B. or the Warden of the Fleet, to be produced by the Officer, or an examined copy of the render as entered there, by which the true time of it will appear; and if it does appear so, there is sufficient Evidence of the render.

In addition to these Pleas, the Defendant may also plead and prove the *death of the Principal* before the return of the *ca. sa.* issued in the Cause, or that no *ca. sa.* issued; (*j*) for if the Principal dies before the return of the *ca. sa.*, the Bail are discharged.

The death of the Principal is proved by a witness who knew him in his lifetime. That a *ca. sa.* issued is matter of proof by the Plaintiff, who may produce the

(*i*) 2 Chitty, 3d Ed. 220.

(*j*) 1 Esp. Dig. N. P. 226. Price *v.* Price, Cro. El. 733. Astley *v.* Reynolds, 2 Stra. 915. Dale *v.* Sollet, 4 Burr. 2133.

writ itself and the return, or an examined copy of it; and it will then appear, whether the Defendant in the original Action was actually dead, at the time of the return of the *ca. sa.* or not. If he was living at the time of the return of the *ca. sa.*, there is no defence for the Bail; for he should have been in actual Custody on the return of the *ca. sa.*

2. *Of the Evidence in Debt on Judgments.*

The Judgment when recovered being matter of Record, when the Plaintiff declares on it, and the Defendant pleads a Plea concluding to the country, as *payment ex. gr*; an office or examined copy of the Judgment, produced by a witness who examined it with the original in the Treasury, and proof that it is a correct copy, is sufficient Evidence for the Plaintiff. Evidence of the payment or satisfaction lies on the Defendant.

But Debt also lies on *foreign Judgments*: they are however not considered as matters of Record, so that the mere production of a copy of the Judgment is not sufficient; they are required to be further authenticated. They are, as expressed by Eyre, C. J. (*k*) *primâ facie* Evidence of a Debt, and have the force of a simple contract. They are, therefore, so declared on, and then are thus proved: (*l*) Judgments from the Courts in the West India Islands, or Colonies abroad, are given in Evidence here, by producing a copy of the Judgment under the Seal of the Court; a copy, though authenticated by an Officer of the Court, will not be sufficient, even though

(*k*) Phillips *v.* Hunter, 2 H. Black. 410.

(*l*) Walker *v.* Witter, Dougl. 1.

it were signed by the Judge of it. (*l*) It is then necessary to prove, by some witness acquainted with it, that the Seal affixed to the Copy, is the Seal of the Island or Colony; without which it is inadmissible; and proof of the Judge's hand is not sufficient. (*m*) But Evidence may be given that the foreign Court has no Seal, and then proof of the signature of the Judge will be sufficient. (*n*)

Judgments from Ireland and Scotland are proved by an examined Copy of the Judgments there, produced by the Person who examined them, and who must swear to their being correct.

I shall now consider the Evidence in Actions of Debt, which respect the *Person*, and the Rules as to establishing the character in which the Plaintiff sues, or the Defendant is sued. These are the same, where the Action is by or against Husband and Wife, or by and against Executor or Administrator, which have been before laid down, *ante*, pag. 153, 155.

I shall, therefore, only observe on the most usual and important.

1. *Of the Evidence in Debt against the Sheriff.*

Debt lies against the Sheriff, for *an escape* of a Defendant in *execution;* whether that escape was

(*l*) Appleton *v.* L. Braybrook, 2 Starkie, 6.
(*m*) Henry *v.* Adey, 4 Esp. N. P. C. 228.
(*n*) Alves *v.* Bunbury, 4 Campb. 28.

negligent or voluntary; (*o*) and the whole sum will be recovered with which he was charged in execution, (*p*) for an escape on *mesne* Process, the Action is Trespass on the case, for which see post, Chap. XIII.

The Evidence which must be brought on the part of the Plaintiff is,—1. The attested or examined Copy of the Judgment recovered in the original Action against the Person who has escaped.—2. The Plaintiff has next to prove, a Writ of *Capias ad satisfaciendum* sued out on that Judgment directed to the Sheriff, a delivery of it to the Sheriff, and a Warrant made out on it, directed to some Officer of his who arrested the Defendant. His actual caption by the Officer must be proved; and after such caption, that the Defendant was seen at large. *Vide ante*, pag. 5.

The copy of the Judgment is had at the Treasury; and must be proved by the witness who examined it, and compared it with the Original. The Writ, which must be proved to have been delivered to the Sheriff, if returned, is filed at the same place; in which case, the Plaintiff should have an examined copy of the writ and return, proved by a witness in the same way; and it will also shew for what sum the Writ was marked: but if the Writ was not returned, the delivery of it must be proved to have been made to the Sheriff, and Witnesses must be subpœnaed from the Sheriff's Office to ascertain the Officer to whom the

(*o*) Stonehouse *v.* Mullins, 2 Stra. 873.

(*p*) Esp. Dig. N. P. 235. Bonafous *v.* Walker, 2 T. Rep. 126.

Warrant was directed. The Officer should be subpœnaed with a *duces tecum* of the Warrant, and the caption be proved to have been made by him : but the *actual* arrest of the Defendant in the Action must be proved ; that is, by touching him, and cannot be by words only, as where the Plaintiff said " I have a writ against you," and the Party said " Very well, I will come out to you immediately ;" but contrived to elude the Bailiff and escape, this was held to be no arrest to warrant an Action against the Sheriff. (*q*) But if there is a return by the Sheriff of *cepi corpus*, which will appear on the Writ, it establishes not only the fact of the actual arrest, (*r*) but all the other facts ; and then the whole of the remaining Evidence is ; that after that return the Defendant was seen at large, or set at liberty by the Officer, which must be proved by a Witness who saw him, or by the Defendant in that Action himself. (*s*)

Whenever therefore it is found, that the Writ of *Ca. sa.* which, in settling the Evidence, is first to be looked to, has not been returned ; as the return of *Cepi Corpus* by the Sheriff, shortens the Plaintiff's Evidence, the Plaintiff should rule the Sheriff to return the Writ, to see by that return, if an arrest had actually taken place or not.

For the further Evidence required in Actions against the Sheriff for an Escape, see *post* same Head in the Chapter of Trespass in the Case.

(*q*) Nassen *v.* Lucas, Ryan and M. 26.
(*r*) Blatch *v.* Archer, Cowp. 63.
(*s*) Bull. N. P. 66.

2. If the Action is against the Sheriff *on Stat.* 29 *Eliz.* c. 4. which Action is usually at the Suit of the Defendant, under the Execution against whose goods, an over levy has been made; the Plaintiff must prove the suing out of a writ of *fi. fa.*, directed to the Sheriff, and delivered to him. The sale by the Sheriff must be proved by the same Evidence as before, and the amount of the levy, and what has been paid over to him: if the Sheriff has levied, (exclusive of what is allowed by Stat. 43 Geo. III.) more than the debt and the poundage allowed by the Stat. 29 Eliz. and which is ascertained by deducting all the regular charges from the sum levied; on Evidence of that so made out, the Plaintiff is entitled to recover. (*t*)

So if the Defendant is taken under a *ca. sa.* and the Sheriff makes the Plaintiff pay more to him than he is entitled to for his poundage, as allowed by the Statute, and proves that fact, he will be entitled to recover the penalty.

Debt also lies against the Sheriff, who has returned, "That he has levied the money under a Writ of *fi. fa.*," to the extent of the sum returned as levied, (*u*) or where he has returned " his having seized goods to the value of £——which were rescued out of his hand," he is equally liable for the value so stated, for it is no excuse; (*x*) and the Action is immediately maintainable without any previous demand. (*y*)

(*t*) 1 Esp. Dig. N. P. 236. Woodgate *v.* Knatchbull, 2 T. Rep. 148. and *vide* Esp. Act. on Statutes, Ch. V. where it is fully treated of.

(*u*) Speake *v.* Richards, Hob. 206.

(*x*) Mildmay *v.* Smith, 2 Saund. 343.

(*y*) Dale *v.* Birch. 3 Camp. 347.

In that case the Plaintiff has only to give in Evidence, the writ itself and the return, or an examined Copy from the Treasury.

This Action will also lie against the Marshal of the King's Bench, the Warden of the Fleet, or any Gaoler having the custody of Persons for Debt, for the escape of a Person in their custody charged in Execution.

In these Actions, the Plaintiff must prove the Judgment against the Defendant who escaped, as in the case against the Sheriff, *ante*, p. 207.; and then prove the *committitur* to the custody of the Marshal, Warden of the Fleet, or other Gaoler, in this way. He should procure a copy of the *committitur* from the books of the Prison, by which, it will appear, that the Party was in custody, and for what sum. He should give notice to produce the original book at the Trial. If he suspects that it will not be produced, he may subpœna the Clerk to the Judge by whom he was committed to the custody of the Marshal, Warden, or other Gaoler, who can prove the fact of the committal; and he should then prove by a witness who knew the Person of the original Defendant, that he was seen at large after his having been so in custody.

The Books of the Prison will shew, in what sum the Defendant was charged in execution, and that is the amount of the Plaintiff's Verdict, as the Jury are bound to give that sum.

Vide this Head *post*, ch. XIII. Trespass on the Case.

Debt is also the mode of declaring for *penalties under Penal Statutes*, and lies at the Suit of an Informer.

It would be extending the subject of this Treatise too far, to go into all the cases of Debt on Penal Statutes; it is sufficient to observe, that the strictest Evidence is required to bring the Defendant within them: and, in settling the Evidence, it ought never to be done without having the Statute open, and seeing that there is Evidence to satisfy every thing which the Statute requires.

Thus, for example, in Debt for killing Game without a qualification, under Stat. 5 Anne, c. 14. The Evidence, required in that case, is the fact of the Defendant using a gun or snares to destroy the Game; this is proved by a witness who saw the fact: but it is not sufficient, to obtain a Verdict, that the Defendant being unqualified was seen with a gun; he must be proved to have been using it. That is, the Evidence must shew that he was seen beating for Game, or firing at them, which would leave no doubt that he was using it for the destruction of the Game. But the Evidence required, where the Action is for exposing Game for Sale, is not so strict. Proof of the actual Sale of it is not required, as the fact of its being seen in the unqualified Person's possession proved by a witness, is sufficient: but the reason of this is, that it is declared to be so by the Statute.

In other cases of Penal Actions, the strictest proof is required.

Such is the Evidence on the part of the Plaintiff: that which is to be brought on the part of *the Defendant* depends, of course, on the Issue; and I shall consider it under the different Pleas.

As every Bond on which a Party can recover, must be for a good and legal consideration, if it is not so, it will afford the Defendant a sufficient defence: but it must be pleaded specially, and the Defendant be prepared with Evidence corresponding with his Plea; as if the consideration of a Bond was usurious, or if usurious interest was reserved or taken, the Defendant must be prepared to prove the transaction as it took place, and shew it to be usurious. So the Defendant may plead, that the Bond was simoniacal: for the purchase of an office prohibited by the Statute: that it was for an immoral consideration, as to induce a woman to live in a state of adultery: that it was for that which it is contrary to good policy to allow, as in restraint of trade: for marriage brokage: for withholding Evidence: or the like; as in all these cases the Bonds are void in Law, upon proof of any of these circumstances when stated in the Plea, the Defendant would have a Verdict. (z) In settling the Evidence therefore where any of these defences is set up, the strict coincidence of the facts with the Plea must be attended to.

The usual general Pleas in Debt on Bond, for

(z) Vid. 1 Esp. Dig. N. P. from page 208 to page 220.

payment of money, are *non est factum: duress: solvit ad,* or, *post diem.*

1. Under *non est factum,* pleaded to Debt on Bond, the Defendant may give in Evidence that, which shews it to be void on the face of it, as well as that, which denies the execution of it, or that he ever delivered it as his Deed.

Evidence to make it void on the face of it may be, *rasure, interlineation, alteration in a material part,* or *breaking off of the Seal;* any of which appearing, renders the Bond void. (*a*) But the breaking off of the Seal of one of the obligors, where there are several, does not make it void as to the rest, who may be sued on it. (*b*) These facts will appear on the production of the Bond, the Plaintiff being bound to produce and prove the execution of it, when *non est factum* is pleaded.

So the Defendant at the Trial may, under that Plea, give in Evidence that he never *delivered it as his Deed,* or that it was made to the Plaintiff's Wife, and that he refused to receive it, or that it was delivered as an *escrow.* (*c*)

These matters of defence are supported by calling a witness to prove the circumstances which took place when the Bond was executed, who can speak to the

(*a*) Esp. Dig. 251. Markham *v.* Gonaston, Cro. El. 626.
(*b*) Collins *v.* Prosser, 1 Barnw. and C. 682.
(*c*) Stoytes *v.* Pearson, 4 Esp. N. P. C. 255.

delivery of it, whether absolute or conditional: so he may speak to the form and contents of it when executed; and prove if any alteration has been made in it. And that has been held to be a delivery as an escrow, where a Party executes a Deed which is to be void in case certain circumstances do not take place, as where a surety executed a composition Deed, which was to be void if all the Creditors did not sign it, this was held to be a delivery as an escrow; and as all the Creditors had not signed it, to be void. (*d*)

So if *non est factum* is pleaded to debt on a Bail Bond; as it is founded on a Writ, and is given for the appearance of the Defendant at the return of the Writ: (*e*) the Execution of the Bond being proved; the Defendant by either producing the Writ, or relying on it as stated in the Declaration, and then referring to the date of the Bail Bond produced at the Trial, if it appears to be subsequent to the return of the Writ, it shews the Bond to be void; for, being after the return of the Writ, the condition could never be performed, it being for the Defendant's appearance *at* the return.

There is therefore this distinction to be observed in settling the Evidence, that wherever it appears on the face of the Bond that it is void, that may be given in Evidence under *non est factum*. So also may matter of fact which makes it void in law. But the above collateral matters which, as has been observed, avoid

(*d*) Johnson *v.* Baker, 4 B. and A. 410.
(*e*) Thompson *v.* Rock, 4 M. and S. 338.

the Bond, must be pleaded and proved, as Usury: that the Bond was given for an illegal purpose, as *e.g.* Simony: for money won at Play: for the sale of an Office: in restraint of Marriage, or of Trade, and the like. And there are other matters held to make the Bond void *ab initio,* and which may be given in Evidence under the General Issue, as the Defendant may prove, that when he executed the Bond, he was a Lunatic: (*f*) an Infant: that he was unlettered and blind, and the Bond was misread to him: (*g*) that he was made drunk, and prevailed upon to sign it; (*h*) or if it is by a woman, that she was a married one: (*i*) these must be made out at the Trial by Evidence.

If the Plea is *duress,* in avoidance of the Bond, the Evidence to support it must prove the Bond to have been executed under compulsion or by threats, as when the Defendant was in custody under an illegal arrest, for a supposed debt, or for felony, where none had been committed, or when legally in prison, by hard treatment. It must be duress of the person, and not of the Party's goods; and so it must be severe and violent treatment, such as would be sufficient to intimidate a man of moderate firmness. (*k*)

2. If the Plea is *solvit ad diem,* or *post diem.*

This Issue is supported by Evidence on the part of

(*f*) Yates *v.* Boen, 2 Stra. 1104.
(*g*) Phillips on Evid. 145.
(*h*) Pitt *v.* Smith, 3 Campb. 34.
(*i*) Bull. N. P. 172.
(*k*) Com. Dig. Pleader, 2 W. 19. Aleyn, 92. 1 Selw. N. P. 552.

the Defendant of actual payment, as by the production of a Receipt in the Plaintiff's hand-writing; or the Defendant may rely on the presumption of law, that from length of time since the Bond became due, payment will be presumed, in which case no Evidence on his part is required; (*l*) for the date of the Bond ascertains the debt, and if twenty years have elapsed since it became due, and no interest be proved to have been paid, it is good Evidence for him under the Issue of *solvit ad diem;* and the expiration of the 20 years is ascertained by shewing the time of bringing the Action.

It should, however, be observed, that the period intervening between the time of payment of the Bond, and the bringing the Action, must be full 20 years; for any time short of it, will not be sufficient. (*m*)

The Plaintiff is, however, at liberty to go into Evidence to rebut that presumption, such as by proving payment of interest within that time. (*n*) So parol Evidence of Defendant's admission, that the Bond was unpaid would be good Evidence; and whether the Bond has been satisfied or not is matter to be left to the Jury. (*o*) In case actual payment is set up, see *ante,* page 171. as to the right of applying it.

(*l*) Rex *v.* Stephens, 1 Burr. 434. Mayor of Hull *v.* Horner, Cowp. 109.

(*m*) 1 Esp. Dig. N. P. 253. Oswald *v.* Leigh, 1 T. Rep. 270. Colsell *v.* Budd, 1 Campb. 27.

(*n*) Morland *v.* Bennett, 1 Stra. 652.

(*o*) Searle *v.* Lord Barrington, 2 Stra. 826.

3. *Foreign Attachment* is a good Plea.

This is usually proved by an Officer or Solicitor of the City Court who produces the original Proceedings in the Cause, and verifies them to be so.

But further Evidence should be given, that the Plaintiff had notice of the Proceedings in the Courts below.

4. *Entry and Eviction* is a good Plea in Debt for Rent: (*p*) but it may be given in Evidence under the General Issue of *Nil debet.*

This is a fact to be proved by Witnesses. (*r*) And the Defendant must give in Evidence the actual entry by the Plaintiff on the Premises: and not that only, as it might only amount to a trespass; (*s*) but he must further prove that he was expelled by the Plaintiff from the possession of the whole or a part of the thing demised, and that he kept the possession against him. (*t*)

Vid. *post.* in Covenant, next Chapter.

4. A discharge under the Insolvent Debtors' Act is a good Plea in Debt or Assumpsit: it is either

(*p*) 1 Esp. Dig. N. P. 260.
(*r*) Hunt *v.* Cope, Cowp. 242.
(*s*) Reynolds *v.* Buckle, Hob. 326.
(*t*) Stevenson *v.* Lambard, 2 East. 575.

under the Lords' Act, or under the general Insolvent Act.

If under the former, the Defendant must produce the Rule of Court by which he was discharged; if the latter, the order of the Insolvent Court for the Defendant's discharge: to prove this the original Entry of the Judgment of the Court ought to be produced; and it will not be sufficient to produce and prove the order to the Marshal of the King's Bench Prison, or other Gaoler, for the discharge of the Defendant, reciting the Judgment. (*u*)

5. *Where the Pleas are by an Heir or Devisee.*

These I shall observe on in their order; and, first, in the case of Debt on Bond against the *Heir*.

If the Defendant admits himself to be *Heir*, and he is chargeable under the Bond in this Character, he is liable only as far as he has assets by descent. He may therefore plead *riens per descent*. In that Case the Issue lies on the Plaintiff, who must prove by Witnesses what Land the Obligor died seised of: then, that the Defendant as his Heir at Law, took possession of them, or has received rent from a tenant of them; or an admission made by him, that he claimed the Land as Heir; or by proof of actual relationship.

So he may plead that the Obligor died indebted in other Bonds which he has paid. This is proved by

(*u*) Doe d. Robinson *v.* Barton, 2 Starkie, 473.

Witnesses; such as by the Obligees who received the money.

If the Heir has Lands by descent, and he pays Debts of his ancestor to the amount of the value of the Land, he shall not be liable, but shall hold them discharged. He must plead this specially; and then prove by Witnesses the value of the land descended, and the amount of the payments made on his Ancestor's account, either by those who received, or those who paid them on his account from the Defendant the heir.(*v*)

A Devisee is bound equally with the Heir to pay the Bond of his Testator by Stat. 3 W. & M. c. 14.; and the only difference in proof is, to shew that he is so by the Obligor's Will.

2. When the Pleas are by an *Executor or Administrator.*

They are, first, a *Retainer,* but which the Defendant may also give in Evidence, under *plenè administravit,* (*x*) and if he does so he may prove the amount of the expenses of the administration without pleading a Retainer of the amount. (*y*) 2. *Plenè Administravit;* and, 3. *Ne unques Executor.*

1. *If Defendant pleads a Retainer,* he is bound to

(*v*) Buckley *v.* Nightingale, 1 Stra. 665.
(*x*) Plumer *v.* Marchant, 3 Burr. 1380. 1 Esp. Dig. N. P. 273.
(*y*) Gillies *v.* Smither, 2 Starkie, 528.

establish his own Debt by the same Evidence which would be required to establish the demand as a Debt against the Testator, as if it was a Bond Debt, by proving the Bond by the Subscribing Witness; if by a Note, by proof of it as before stated in Assumpsit; and having done so, the law gives him his right of Retainer to their amount.

But he can retain for his own Debt, only as against debts of equal degree: as if there were Bond Creditors, and he was a Creditor by Simple Contract, he could not retain against them. This, therefore, in settling the Evidence, must be strictly attended to.

2. If the Defendant pleads *plenè administravit.*

That Issue is supported, by proving in the first place, the necessary Expenses incurred for the funeral of the Testator or Intestate, the Expense of proving the Will, and of obtaining the Probate or Letters of Administration. The amount so expended can be proved by the Person who paid or received the money for those purposes. The Defendant must then proceed to prove the payment by him of Debts due by the Testator to others, and which were of a higher or equal degree with that for which the Action is brought. (z)

As the Executor or Administrator is bound to pay the debts of the deceased according to their degree, in settling the Evidence under this Plea, the order and degree of the debts as to priority of payment, must

(z) 1 Esp. Dig. N. P. 275.

be attended to. Funeral Expenses are first to be paid: Next after those Debts of Record or by Specialty due to the King: Debts under particular Statutes, such as Poor Rates; or for letters to the Post Office: Next are Debts of Record, as Judgments, Statutes, and Recognizances: Debts by Specialty rank next, as Bonds, Rent reserved either by Lease or parol: and, lastly, Simple Contracts, as Notes, Bills, or for money lent, goods sold, or the like. Where the Executor or Administrator relies on payments made on any of these accounts, he must prove the fact of actual payment; and if he has paid a Debt of a lower degree, before that of an higher, he must pay it out of his own Estate. (*a*)

The proof of these Payments are matters of fact, and to be proved by Witnesses: this most usually is done by the Parties themselves, to whom the Payments have been made, and who can establish the existence of the Debts due to them, as well as the Payments. So if there were any written Securities of the Testator, as Bonds or Notes, paid off by the Executor or Administrator and of course given up to them, they should be produced and proved to be paid: but they must be shewn to be valid Securities, and entitled to preference. (*b*) If, therefore, the Executor or Administrator sets up a Bond as paid, he must prove that it was a valid one, by proof of the sealing and delivery of it: but the proof of

(*a*) Godfrey *v.* Newton, Cas. K. B. 7.
(*b*) 1 Esp. Dig. 286.

mere Payment of simple contract Debts is sufficient. (*c*)

Where a Bond is lost, or has been destroyed on being paid by an Executor or Administrator, and on *plenè administravit* pleaded to another Debt he wants to avail himself of the Payment made of it; he can only do it by calling the subscribing Witness to that Bond, to prove its former Existence, and then proving its destruction, (*d*) in addition to the proof of payment of it.

If the Defendant pleads *plenè administravit,* which the Plaintiff denies, and on which Issue is joined, the Plaintiffs relying that he has assets *ultra;* in order to charge him with Assets, the Plaintiff must shew what effects of Testator's came to his hands; such as the value of Testator's Stock, Debts due to him, &c. and for that purpose if the Defendant is an Administrator, he may give in Evidence the Inventory exhibited to the Spiritual Court, and signed by him; and if so it shall charge him to the extent. But though fixed with assets to a certain extent, the Defendant whether Executor or Administrator may give in evidence payment of Debts of the Testator with his own money to that extent: (*e*) and the Plaintiff may also surcharge it, by shewing the Property undervalued or Property omitted; and if in

(*c*) Saunderson *v.* Nicholle, 1 Show. 81.
(*d*) Gillies *v.* Smither, 2 Stark. 528.
(*e*) Co. Litt. 283, *a.*

the account the Defendant gave in a list of Debts, not distinguishing the good Debts from the bad, he shall be charged with all. (*f*)

So where the Defendant, Executor or Administrator relies on payment of Debts in the due course of Administration, the Plaintiff may contest and claim a legal priority, as that his is a Judgment Debt. The Defendant may give in Evidence that he searched for such Judgment, and that none such was found docketed, and so under Stat. 4 & 5 W. & M. c. 20. he is not entitled to priority, for Judgments not docketed, are considered as simple Contract Debts. (*g*)

3. If the Defendant pleads *ne unques Executor* or *Administrator*.

This Plea is a denial of the Plaintiff's right to sue in the character of Executor or Administrator. If he sues as Executor, it is not a mere denial that he has got Probate of the will, for that he makes Profert of; but it is that he is not rightful Executor, he having no legal Probate.

As for example, if Probate had been granted to the Plaintiff of a *Will*, which was afterwards set *aside for Forgery or Fraud*, (*h*) proof of this would support that Plea.

(*f*) 1 Esp. Dig. 286.
(*g*) Per Lawrence, J., in Hickey *v.* Hayter, 6 T. Rep. 388.
(*h*) Noell *v.* Wells, 1 Lev. 235.

As that the Seal of the Ordinary was forged: to establish that fact he must prove the true Seal by production of it, or by the Evidence of those who know it. So if the Plaintiff sues as Administrator, the Defendant may shew that the Administration was repealed; if as Executor, that the *Will* was set aside; so that though the Plaintiff once was in possession of a Probate, and so could have made a Profert, the Probate being annulled, he is no longer Executor, *ne unques Executor.* In a case, therefore, so circumstanced, the Defendant should give in Evidence the sentence of the Spiritual Court, by which the Will was set aside, or the Administration was repealed; and a new Probate or Letters of Administration ordered to be granted, by which it will appear, that the Plaintiff was not then Executor or Administrator. The Evidence as to this is, an Office or Examined Copy of the Sentence of the Spiritual Court produced by a witness who compared it.

Under this Issue the Defendant may shew that the Probate has been *irregularly granted* in respect of *bona notabilia.*

Thus, if the Plaintiff had declared as Executor, and made profert of a Probate, granted by the Bishop of London, and the Defendant proved that the Testator had *bona notabilia* in the Diocese of another Bishop, (*i*) the Probate would be *void,* for there

(*i*) 1 Esp. Dig. N. P. 279. Burston *v.* Ridley, Salk. 39. Byron *v.* Byron, Cro. Eliz. (472.)

should then have been a *Prerogative Probate,* (*k*) or Letters of Administration. The Defendant, therefore, in support of his Plea, should give Evidence of the Deceased having left Assets in different Dioceses; and then he supports his Plea. And as to this it may be observed, that Bonds or Specialties are Assets where the Securities are, when the Testator died: but Debts by Simple Contract follow the Person, and are Assets where he died. (*l*)

So if the Action is brought by an Administrator for a greater sum than is sworn to on granting the Letters of Administration, (*m*) he cannot recover; for then the Letters of Administration are void for want of a proper stamp. (*n*)

To establish a defence on this ground, the Defendant must shew the Assets sworn to, and that the Sum for which the Action is brought, exceeds that, for which Administration was granted; for which purpose, he may produce a copy of the Bond given on granting the Administration, and filed in the Prerogative Court or Office of the Bishop, or have the original produced by the Officer. This will ascertain to what amount of Assets, Administration was granted; and if the Sum claimed by the Plaintiff as Administrator, exceeds it, the Administration being limited to a lesser Sum, he has no legal right to claim a sum exceeding it.

(*k*) Rex *v.* Loggen, 1 Str. 73.
(*l*) Byron *v.* Byron, Cro. El. 472.
(*m*) Hunt *v.* Stevens, 3 Taunt. 113.
(*n*) Thynne *v.* Protheroe, 2 M. and S. 553.

And it should seem, that the Defendant might go into Evidence, to shew how much Property the Plaintiff had received of the Testator's, and then by the production of the Bond, and by what appears on the face of Letters of Administration, *viz.* "sworn to be under £ ——" the Plaintiff could not succeed: so the Defendant may shew that the Seal of the Ordinary is forged; (*o*) and that, therefore, the Administration is void.

If in an Action against Executors, it is necessary to have the Probate to give in Evidence, and the Executor does not produce it after notice, the Party requiring it may give in Evidence, the original *Will* from the Commons, which is produced by an Officer of the Ecclesiastical Court, bearing the Seal of that Court, and indorsed as the instrument on which the Probate was granted. (*p*)

6. *Of the Evidence in Actions against Assignees of a Lease or Term, for Rent in Arrear.*

If the Lessee assigns, he remains still liable in Debt for Rent becoming due after Assignment, (*q*) unless the Lessor has accepted Rent from the Assignee, in which case he can never sue the first Lessee in Debt; (*r*) but he may in Covenant.

If, therefore, there has been an Assignment, and the

(*o*) Noell *v.* Wells, 1 Lev. 235. 1 Sid. 359. S. C.
(*p*) Gorton *v.* Dyson, 1 Brod. and B. 219.
(*q*) Walker's case, 3 Co. 22.
(*r*) Marsh *v.* Brace, Cro. Jac. 334. 1 Saund. 241. n. 5.

Lessor has accepted Rent of the Assignee, and he sues the original Lessee; the Lessee, if sued, must plead specially, "That he assigned all his right, title, and interest in the Land, to come and unexpired, to A. B. *e. g.* who entered, and from whom the Plaintiff accepted Rent." (*s*) The Plea states the assignment to such Person to be by Deed, and the fact must be proved, by producing and regularly proving the Deed of Assignment to such Person, by the subscribing witness, and then giving Evidence of the receipt of Rent by the Plaintiff from such Person as Assignee, who must be proved to have taken Possession; and for that purpose the Assignee is a good Witness.

But if the Action is against an Assignee (*t*) for Rent in arrear, he is only liable while in possession; and he may shew an Assignment made by him to a third Person, prior to the cause of Action accrued. This must be specially pleaded (*u*) and the Plea is supported, by producing and proving such Assignment by the subscribing witness, and that he was not in possession at the time for which the Rent sought to be recovered became due. For this purpose his Assignee is a good witness to prove when *he* became so, and entered into possession.

An Executor is considered as an Assignee in Law; and the same Rule applies to him. (*v*)

(*s*) Vid. Plea, 2 Chitty, 518.
(*t*) Lekeux *v.* Nash, 2 Stra. 1221. Pitcher *v.* Tovey, Salk. 81.
(*u*) Vid. 2 Chitty, 519.
(*v*) Marrow *v.* Turpin, Cro. Eliz. 715.

7. *Of the Evidence on the Plea of Accord and Satisfaction.*

As this Plea must set out, what the Defendant gave in satisfaction of the Plaintiff's demand, he must prove, first, that the Plaintiff agreed to take the thing mentioned, in satisfaction of his demand; and, secondly, that it was absolutely delivered, so that the whole transaction is complete and ended. That is to be done, by witnesses who were present when the Plaintiff agreed to take the thing stated in discharge of his demand; and then the Defendant must prove the delivery of it to the Plaintiff who accepted it.

8. *Of the Evidence under the Plea of Nil Debet.*

This is a bad Plea where the Sum claimed is due by Specialty, and applies to Debt on Simple Contract only.

In Actions of Debt on Simple Contract, *Nil Debet* is the General Issue; and it is material to consider, what the Defendant may give in Evidence under it. (*w*)

1. By the Statute of Limitations, Six Years is a bar to the recovery of Debts due by Simple Contract, and is in Actions of Assumpsit always pleaded: but it has been held that in *Debt*, it need not be pleaded, (*x*) and that the Defendant may have the benefit of it

(*w*) Esp. Dig. Vol. I. 287.
(*x*) Duppa *v.* Mayo, 1 Saund. 283. n. 2.

under the Plea of *Nil Debet.* (*y*) For as the Statute has declared the Debt to be irrecoverable by reason of the Six Years being passed, the Defendant at the time of bringing the Action, may be said then *to owe nothing.* To avail himself therefore of that defence, the Defendant may produce the Writ, to shew *when* the Action was commenced, and then shew *when* the cause of Action accrued; as if it was on a Note, he may shew by the date when it became due: if for money lent, shew that it was more than Six Years ago: and so of other Simple Contract Debts whereon the *Statute of Limitations* may attach, and be a bar to the Action, by reason of the period of Limitation being passed. But the Note: the facts of Loan of money: Goods sold, &c. must be proved to have taken place; and the times be accurately fixed by the Witnesses

2. He may give Entry and Expulsion in Evidence under that Issue, though he may also plead it. *Ante,* 217. (*z*)

3. That he was only Executor *durante minore ætate* of the Executor: (*a*) that he paid Debts and Legacies, and delivered over to the rightful Executor all the residue of Testator's effects on his coming of age. In such case he must produce the Probate granted to him, prove that the Executor is come of full age; then prove the payment of the Debts, by

(*y*) Anon. Salk. 278.
(*z*) Drake *v.* Beere, 1 Sid. 151.
(*a*) Brooking *v.* Jennings, 1 Mod. 174.

shewing proper discharges; and, lastly, the payment over of the residue to the Executor.

If the Defendant paid the Debt under Process of foreign Attachment, he may give it in Evidence under this Plea, by producing the Record of the Cause in the Mayor's Court with an Entry of satisfaction. (*b*)

These are the principal Pleas in this Action, and Evidence in support of which will afford a sufficient defence to the Defendant. It may, however, be observed in general, that almost every Plea which is good in Assumpsit in discharge of a Debt, is available in this Action; and by referring to them, the Rules for settling the Evidence will be found at length.

(*b*) Huxham *v.* Smith, 2 Campb. 19.

CHAPTER IV.

OF SETTLING THE EVIDENCE IN THE ACTION OF COVENANT.

An Action of Covenant is founded on a Deed, and it must be so stated in the Declaration. (*c*) *Non est factum* is pleaded in almost every instance. The Plaintiff must when it is so pleaded, prove the execution of it by calling the subscribing witness. The Rules are the same as in the Action of Debt, as to the exceptions before-mentioned in the preceding Chapter.—Vid. *ante*, page 185, for Cases in which it is not required to call him. (*d*)

The Construction of Covenants belongs to the Judges, who expound them according to Law and the meaning of the Parties. The Plaintiff or Defendant at *Nisi Prius*, is confined to Evidence of the breaches assigned in the Declaration only, when the Execution of the Deed is proved or admitted.

Covenants being for various purposes, it is impos-

(*c*) Esp. Dig. N. P. 320.
(*d*) Moore *v.* Jones, 2 Stra. 814.

sible to put particular Cases, some few leading ones excepted. General Rules can only be given: therefore,

1. Where the Plaintiff *assigns a breach generally in the words of the Covenant,* and specifies how it has been done, his Evidence must correspond with his particular statement of the breach. (*e*)

In settling, therefore, the Evidence for the Plaintiff, nothing more is necessary, than to look to the Deed on which the Action is brought, and to confine the Evidence strictly to it; for the Plaintiff cannot go out of it, nor vary it by any parol proof. As *e. g.* if the Plaintiff had covenanted by Deed, to do any thing by a certain time, and for which he was to be paid, but which work he had not done at the time and yet sued for payment. He could not be allowed to go into parol Evidence to prove, that the Defendant had enlarged the time for his doing it: for declaring on the Deed, he could only assign a breach of what was contained in the Deed itself. (*f*)

But if the Plaintiff assigns a breach in the words of the Deed itself, as on a Covenant "to use the Land in an husbandlike manner," and afterwards renders those general words more particularly applicable to the grievance, as by stating the breach thus, "but on the contrary had committed great waste, spoil, and destruction," the breach is confined to the latter words only. The Evidence to be produced is to be confined to those

(*e*) 1 Esp. Dig. N. P. 331.
(*f*) Littler *v.* Holland, 3 T. Rep. 590.

only, and not to the general ones, respecting the using the Land in an husbandlike manner. (*g*)

So *e. g.* if the Covenant was "not to buy or sell for a given time, without leave of the Plaintiff," and Plaintiff assigns a breach, that the Defendant did sell to A., B., and C.; he must prove his Declaration, by giving Evidence of sales to some of those particular persons mentioned in the Declaration. And they are good witnesses to prove it, though other witnesses may be called to prove the same facts. It will not be sufficient to prove Sales made by him to other persons not mentioned in the Declaration.

2. If there is *any thing to be done by the Plaintiff,* previous to that, which the Defendant covenants to do, he must prove by Evidence that he did it, or offered to do it.

As if the Defendant had covenanted, to pay a certain sum of money, on the Plaintiff executing to him an assignment of certain Premises; the Plaintiff should prove, that he either did assign, by proving a Deed regularly executed and delivered, or that he tendered and offered such a Deed to the Defendant, which he declined to accept; and which facts must be proved by a witness.

As the verdict in Covenant is for *Damages,* the Plaintiff should be prepared not only to prove a breach of the Defendant's Covenant, but also what

(*g*) Harris *v.* Mantle, 3 T. Rep. 307.

sum will be a sufficient recompence to himself for the breach of it.

As in Covenant for not repairing an House, the Plaintiff must not only prove, that the House was ruinous and decayed, but also what sum it would require to repair it, as that is the proper measure of his damages. This must be done by witnesses, who have made an estimate; otherwise he will get nominal damages only.

3. If the Plaintiff declares as *Assignee* of the Lessor or Grantor, as it is necessary that he should state in his Declaration his whole title, regularly deduced from them; so he must prove his *whole title,* as stated in his Declaration, by regular Evidence. If any step, or part of his title, is by Deed, as by direct assignment from the Lessor, *e. g.* he must call the subscribing witness to prove the execution of it. If the Estate is fee simple, and he states himself as *Heir* to the Lessor, he must prove that he is so; if as *Devisee,* he must produce the Will, and prove by the witnesses subscribed to it, its regular execution by the Testator. If the Lessor or Grantor had an *interest for years only,* and the Plaintiff declares as *Legatee, Executor, or Administrator* of the Lessor, Probate of the *Will* will then be sufficient to shew the Bequest to the Legatee: but he must also shew the assent of the Executor to his taking the Lease; and it will also establish the Executor as Plaintiff,

(*h*) Vid. *plenius*, Chap. of Ejectment.

the Letters of Administration will prove his title as Administrator. (*i*)

If the title is derived from *Marriage,* as an Estate or Term, in right of his wife; it must be regularly proved, as before stated in Actions by *Baron* and *Feme.*

If the title is by a *private Act of Parliament,* there must be an examined copy produced from the Parliament Roll, and proved by a witness who examined it.

If the Defendant is sued *as Assignee,* the Plaintiff declares against him generally, as *Assignee,* as he cannot know by what title he becomes so. The Plaintiff's proofs are, therefore, his own title; and then it is sufficient for him to give general Evidence from whence an Assignment may be inferred, such as the Defendant's being in possession, or having paid rent: and payment of rent to the Plaintiff by the Defendant, who has been let into possession of the Premises by the original Lessee, is *primâ facie* Evidence of an Assignment of the whole Term. The Defendant may however give in Evidence, that he is not Assignee of the whole interest, or is an undertenant only; in which cases the Plaintiff cannot recover against him. These matters are objects of *vivâ voce* Evidence. (*k*)

(*i*) How these are proved, vid. *plenius*, Chap. of Ejectment.

(*k*) Holford *v.* Hatch, Dougl. 174. Devisley *v.* Custance, 4 T. Rep. 75. Hare *v.* Cator, Cowp. 766.

What will be Evidence in defence, by the Defendant, will be found *post*, under the head of, "*Evidence on the breach of the Covenant not to assign, &c.*"

4. If the Action is against the *Assignees of a Bankrupt* on a Demise of Land, or Premises which belonged to the Bankrupt, (*l*) the Plaintiffs must prove that the Assignees took possession of the Premises demised; and kept the possession not merely to try to ascertain the value of them, but as taking to the interest with a view to make it an efficient part of the Bankrupt's Estate: this is a matter of some difficulty in Evidence, as to what shall amount to a taking to the Premises.

The Plaintiff should, therefore, be prepared with witnesses to prove, *when* the Assignees took possession, *how long* they held them: and what acts of Ownership they exercised. It is important, if the fact took place, for the Plaintiff to shew, that he applied to the Defendants, (the Assignees,) for the possession; and that they either refused it, or gave him an equivocal answer. (*m*)

I shall now consider the Evidence in cases where the breach of particular Covenants is assigned.

1. *Of the Evidence in Covenant for non-payment of Rent.*

If the Defendant pleads payment, that is *solvit ad*

(*l*) Bourdillon *v.* Dalton, 1 Esp. N. P. C. 233. Turner *v.* Richardson, 7 East. 335. Wheeler *v.* Bramah, 3 Campb. 340.
(*m*) Turner *v.* Richardson, 7 East. 339.

diem, or *riens in arrere*, the Issue lies on the Defendant; for the Lease being proved, the reservation and amount of the Rent appears by it. The Plaintiff is therefore called upon for no further Evidence: but the Defendant must prove actual payment. This may be done by a Witness who saw it paid, or by a receipt proved to be the Plaintiff's hand-writing.

2. *Of the Evidence where the breach is on the Covenant for Quiet Enjoyment, and to keep harmless against all Persons claiming Title.*

If the Plaintiff declares for a breach of the Covenant for Quiet Enjoyment, in a Lease from the Defendant to him, (*n*) it will not be sufficient for him to prove merely, that he has been disturbed or evicted, for that might be done wrongfully by a stranger who would be subject to an Action for it; he must go further, and prove that it was done, either by the Lessor himself, or by some Person claiming by elder title or under him. For this purpose, the Plaintiff must go into Evidence, of the manner in which he was disturbed in the possession, and shew under what colour it was done; as *ex. gr.* if he was evicted by Ejectment, he should shew the Judgment obtained in Ejectment by producing an examined copy, and calling the Person who so recovered, and prove the *Habere* executed.

But in settling the Evidence, in this respect, the Covenant should be accurately looked to, as the usual form of it by the Lessor now is, " for quiet Enjoy-

(*n*) 1 Esp. Dig. N. P. 297. 1 Inst. 35. F. N. B. 342.

ment against himself, and *all those claiming by, through, or under him.*" (*o*) By those Persons are meant, those who derive their Title through him, as his Assignee, Heir, Executor, or Administrator; in which case, though the Lessee was disturbed or evicted, the Lessor would not be liable, unless the Plaintiff could prove, that the Person who disturbed him, did claim by, through, or under his Lessor, the Defendant. This may be done by production of the proceedings, or by calling, as well in the last case as in this, the Party who has made the Eviction to state the ground of his Proceeding.

Where a Lessee is likely to be disturbed in his enjoyment of the Premises demised, as, by having an Ejectment served on him; it is always prudent to acquaint the Lessor of such proceeding, and to give him notice, that in case of Eviction he will be called upon under the Covenant for quiet enjoyment. If that has been done, and the Lessor has not defended the possession, and the Plaintiff has in consequence been evicted; by giving Evidence of his having so given notice to his Lessor to defend, it should seem to be sufficient to shew the Eviction only without going into any Evidence of the title of the Person evicting.

It has been stated that the Plaintiff must shew the manner in which he has been disturbed, (*p*) for it is necessary that it should be done by some *act*; for a

(*o*) Browning *v.* Wright, 2 Bos. and Pull. 13. Barton *v.* Fitzgerald, 15 East. 530.

(*p*) Witchcot *v.* Nine, 1 Brownl. 81.

verbal disturbance, as, *e. g.* by prohibiting his Tenant to whom he had underlet not to pay Rent to him, is not sufficient.

The further Evidence required under the breach of this Covenant is the amount of the damages laid in the Declaration, to which the Evidence must be confined, as *e. g.* if the Plaintiff was evicted from a Farm, without being allowed to cut his crops, he would lay the value and loss of them as his damages. For this purpose he should call Witnesses, and so in cases of other damage laid.

2. *Of the Evidence where the breach is on the Covenant, not to alien, assign, or part with the possession.* (*q*)

In this case, if the Plaintiff proceeds on the latter part of that Covenant, "the parting with the possession:" after proving the execution of the Lease; he has only to prove that some Person, not the Lessee, is in possession of the demised Premises. (*r*) If he proceeds on the former, he should call the Person, whom he supposes or knows to be the Assignee, to prove that the Defendant assigned the Premises to him. He is not called upon to prove any Deed of regular assignment to him, as that belongs to the Assignee. But the Defendant, when so charged for having assigned, may shew, that the Person who is in possession, or presumed to be in possession, (*s*) is not an *Assignee*, but an *under-Lessee* only; to prove which

(*q*) 1 Esp. Dig. N. P. 300.
(*r*) Gretton *v.* Diggles, 4 Taunt. 766.

he must either prove the Lease made to him, by calling the subscribing witness, or by a witness who knows the fact. The under-Lessee himself is for this purpose a good witness. So he may shew, that he merely *deposited the Lease* with a Person who took it as a *security for money* advanced, for that is not a breach of the Covenant. (*t*) So he may shew, that though the Premises were assigned, it was by his Assignees in consequence of his becoming a Bankrupt. (*u*) In that case, he should produce the proceedings and the assignment, by a *subpœna duces tecum* to the Assignee of the Term; and then, by proving the execution of it, from the Bankrupt's Assignees to a purchaser, he proves his case. So he may shew that the Lease was sold by the Sheriff under an execution against him; (*v*) in that case, he should give the Writ of *Fi. fa.* in Evidence by an examined copy, and then prove by a witness the sale by the Sheriff to some other Person, and by a *subpœna duces tecum* to that Person, have the Bill of Sale from the Sheriff, and prove the execution of it by the Subscribing Witness.

So if the Lessor had accepted an Assignee as his Tenant, and he sues him, the Defendant may plead that before the Covenant broken *he* had assigned to another. Proving this, as in the cases of Debt, (*ante* 227,) discharges the Defendant, (*x*) for he was not Assignee at the time of the breach.

(*s*) Poultney *v.* Holme, 1 Stra. 405. Holford *v.* Hatch, Dougl. 174.
(*t*) Doe d. Pitt *v.* Lenning, Ryan, and M. 36.
(*u*) Doe d. Goodbehere *v.* Bavan, 3 M. and S. 353.
(*v*) Doe d. Mitchinson *v.* Carter, 8 T. Rep. 57.
(*x*) Eaton *v.* Jaques, Douglas, 438.

This Covenant is often, "Not to assign without the Lessor's leave in writing first had and obtained." In settling the Evidence in that case, it must be observed, that a *parol licence is not good:* there must be a licence in writing; and it must be produced and proved at the Trial, by a witness, to be the Lessor's hand-writing. (*x*)

3. *Of the Evidence where the breach is on the Covenant to Repair and Deliver up in Repair.* (*y*)

This is a question of fact, and to be tried by the testimony of witnesses, as to the state of the repairs. It is, however, laid down in a book of high authority, (*z*) that "ordinary and natural decay is not a breach of this Covenant." It may, therefore, be advisable, in Settling the Evidence on this head, for the Defendant to prove, that though the premises are in a bad state, it has proceeded from natural decay. This is matter of opinion of Persons of skill, who should be called: but the Defendant must also shew, that he kept the Premises otherwise in proper repair, so that the decay was not caused by his neglect.

The Defendant, if he had a term, should prove his having regularly repaired the Premises during all the time. He may call as witnesses, those who did the work, and prove the payments made to them on account of it. He should also prove, by a survey made shortly before the expiration of his term, that the repairs were such as were required from an outgoing Tenant.

(*x*) Roe ex d. Gregson *v.* Harrison, 2 T. Rep. 425.

(*y*) 1 Esp. Dig. N. P. 301.

(*z*) Fitzh. Abr. Title Covenant, fol. 4.

It is an usual Covenant, for the Tenant to repair, *the Lessor finding rough timber.* If the Tenant is sued on this Covenant, he may shew, that he required of his Lessor to assign him or give him rough timber, which he refused or neglected to do. This may be proved by a Witness, who made the demand. If this is proved, it is sufficient Evidence for the Defendant, the finding the timber being a condition precedent.

4. *Of the Evidence on the Breach of Covenant not to plough Meadow, and to use the Land in a husbandlike way.*

In this case the Plaintiff must prove that the Land (of the breaking up of which he complains) was really meadow at the time of the demise; (*a*) this is done by a Witness, who knew it: and he must then prove the fact of the ploughing of it up, and give Evidence of the amount of the damages.

As to the Evidence of using the Land in an husbandlike way, vide *ante*, Chap. of Assumpsit, p. 109.

5. *Of the Evidence on the breach of Covenant, not to follow an offensive or noisome Trade, or any particular Business excepted by Covenant in the Lease.*

In preparing the Evidence under any supposed breaches of these Covenants, care must be taken that

(*a*) Skipwith *v.* Green, 1 Str. 610.

the Trade or Business, the following of which the Plaintiff imputes to the Defendant as a breach of his Covenant, is in fact such a Trade or Business as is mentioned in the Covenant, as if it was *e. g.* not to carry on a noisome or offensive trade: what the Tenant carries on must be proved to be noisome or offensive; and what answers such a description is matter of Law. As on the Covenant restraining a Tenant under Lease of an house not to follow particular Trades, the Court held that turning a dwelling house into *a School,* was a breach of such Covenant: (*b*) but where the Covenant was, that the Defendant should not carry on any Trade or Business, that might be or grow, or lead to be offensive, or any annoyance or disturbance to any of the other Tenants of the Lessor. It was held that the carrying on of the business of a *Publican* was not a breach of the Covenant. (*c*)

6. *Of the Evidence in Covenant under Indentures of Apprenticeship.*

The Plaintiff must first produce and prove, by the subscribing witness, the Defendant's execution of the Indenture. The Stat. 8 Ann. c. 9. imposes a duty on the sums paid as an Apprentice Fee; and then enacts, " That no Indenture of Apprenticeship shall be given in Evidence, unless the Party on whose behalf it is to be so given shall make oath that the sum inserted in the Indenture was all that was actually paid." But there is no necessity for an affidavit of the Party to

(*b*) Doe d. Bish *v.* Keeling, 1 M. and S. 95.
(*c*) Jones *v.* Thorne, 1 Barn. and C. 71 1

that effect to be produced at the Trial, or the Party then to swear it. (*d*)

Of the Evidence for the Defendants.

1. Under some of the preceding heads I have stated the Evidence for the Defendants. Such as what are the matters of defence which a Defendant may rely on, and under the other heads of particular Covenants. It may now be necessary to apply to the Evidence generally as proving matters of defence. It should, however, previously be observed, that where a Party has entered into an express Covenant, no circumstances, even of future impossibility from natural causes, can discharge him. Evidence to this effect is often made part of the Proofs: but, as it is perfectly inadmissible, should never be set down among them. Such as if a ship is chartered to sail by a certain day, though from adverse winds it was impossible; it does not discharge the Covenant contained in the charter-party. (*e*) The Defendant is, therefore, always in such case only discharged by the Plea and Evidence of performance; as in the case just mentioned, the Defendant would be only discharged by calling a witness to prove the actual time of the ship's sailing, and that it was on the day mentioned in the charter-party.

2. The Defendant may plead and shew in his defence other Covenants in bar of those on which he is sued. (*f*) These Covenants may be either in the Deed

(*d*) Stewart *v.* Lawton, 1 Bing. 374.

(*e*) Shubrick *v.* Salmond, 3 Burr. 1637.

(*f*) 1 Esp. Dig. N. P. 327.

itself on which the Action is brought, or in another. If they are in the same Deed, when the Plaintiff has proved the Deed, by the subscribing Witness, the Plea may be supported by referring to part of the same clause in the Covenant relied on by the Plaintiff or to another Covenant in the same Deed, as if the Action was Covenant for non-payment of Rent, and in the same Deed there was a Covenant that the Lessee might retain out of it what he expended in repairs. The Defendant by shewing that Covenant, and proving by Witnesses that he had expended in repairs to the amount of the Rent, would be entitled to a verdict. (*f*)

But if the Plea is, of *Covenants in another Indenture,* in bar, that Indenture must be produced and proved by the Subscribing Witness. But this last Deed must appear to be intended to operate as a defeasance to the first, and to refer to it so in terms, or it will be no bar. (*g*)

Where the Defendant has pleaded a Covenant or Covenants in another Indenture in bar of the Action: In settling the Evidence, it is necessary to compare one Deed with the other, and to see that they have reference to each other. This is generally done by a recital in the latter Deed of the former; that would be sufficient to connect them: but the Defendant must give Evidence to that effect.

3. *Non est factum* is another Plea, (the Evidence

(*f*) Johnson *v.* Carr, 1 Lev. 152. Gawden *v.* Draper, 2 Vent. 217.

(*g*) Clayton *v.* Kynaston, 2 Salk. 573. Lacy *v.* Kynaston, 2 Salk. 575.

as to which has already been treated of, *ante*, 213.) And as to what in an action of Covenant the Defendant may avail himself of, it is to be observed, that the Plea of *Non est factum* is not a mere denial that the Defendant did execute the Deed declared on, but that he did not execute a Deed with such Covenants as the Plaintiff has stated in his Declaration; as if the Plaintiff declared on an absolute Covenant, when in fact the Covenant contained a material exception, that would not be the Defendant's actual deed, and he can then avail himself of it.

As the Declaration states the Covenant on which the Plaintiff grounds his right of Action, and under the Plea of *Non est factum* the deed containing the Covenant is produced and read in Court, it will then appear whether it is correctly set out or not, on which ground any misrecital is fatal; and it is always therefore necessary before the Trial to compare the original deed with the declaration. For where the Plaintiff declared in Covenant that, in *consideration of certain furnaces* to be erected by the Plaintiff, he T. B. did demise, and at the Trial the Deed being produced and read, the Covenant was " in consideration as well of the erection of certain furnaces, *as also for building Houses and payment of Rent*, T. B. did demise; this was held to be a fatal variance: for the Covenant set out was not that which the Defendant entered into, and it was therefore not his deed. (*g*) This variance therefore is only to be guarded against, by comparing the deed itself with the Covenant stated in the Declaration.

(*g*) Swallow *v.* Beaumont, 2 Barn. and Ald. 765.

4. *Entry and Eviction* is also a good Plea in this Action, and has also been treated of before. But in the case of Covenant, the Defendant is bound to prove by Witnesses that the Entry and Eviction was done by the Plaintiff or by his direction, and was such as to prevent his performing the Covenant; for if it could be performed, the Plea will not be supported. (*g*)

Thus, *ex. gr.* If the Covenant was to repair the dwelling-house, and Entry and Eviction pleaded, (*h*) and the Entry proved was into the back-yard: this would not support the Plea, unless the Defendant also shewed that by such Entry he was totally prevented from repairing the house.

5. *A Release* is a good Plea in this Action: but, to be available, it must be by Deed, and which must appear to have been regularly executed, proved by the subscribing witness. For this purpose the Defendant must have Evidence to prove the precise time of the Covenant being broken. He must then prove the execution of the Release by the Subscribing Witness; and prove that it was executed at the time it bears date, so that it may appear whether before or after the day of the breach just above mentioned, as the operation of it will then depend on the words of the release.

For that purpose where a Release is proposed to be given in Evidence, the words of the Release are to be looked at and attended to. If before any breach of

(*g*) Carrell *v.* Read, Cro. El. 374.
(*h*) Bull. N. P. 165.

Covenant committed, the Plaintiff had released the Defendant from *all Covenants,* the Covenant would then be at an end and no Action could be supported on it, as the Release would be a decisive answer: but if the words of the Release were "*of all Actions, Suits, and Quarrels,*" which was made before the Covenant was broken, that Release would be no answer to the Action, for at the time it was made there was no Action, Suit, or Quarrel depending; and as it could not affect or operate on a future cause of Action, it would be no bar. That distinction should therefore be attended to: but a Release in the latter words given after the Covenant broken would be a bar to the Action; for then there was a cause of Action, and Suit subsisting.

6. *Accord and Satisfaction is a good Plea* in this Action, as to which see the Rules of Evidence, *ante,* 228. It should, however, in the case of Covenant, be proved by Witnesses to have taken place after a breach of Covenant committed; for, until the Covenant was broken, there was nothing for which satisfaction was to be made; the time of which should be ascertained as mentioned before, and the time of the Accord and Satisfaction be proved by a Witness, as well as the Accord and Satisfaction itself.

7. *Infancy* is a good Plea in this Action, and decisive if proved. As to the Evidence, vid. *ante,* 166, 7.

These are the principal heads of defence on which the Defendant may rely. *Non est factum* is generally pleaded with them; and the Defendant's Evidence is of course to be governed by his Pleas.

CHAPTER V.

OF SETTLING THE EVIDENCE IN ACTIONS OF ASSAULT AND FALSE IMPRISONMENT.

THESE Actions, and that of Trespass *vi et armis* properly so called, being those usually brought against Magistrates and Peace Officers, and Officers of the Excise and Customs; in all of which notice of Action is required to be given, and proof of it regularly made at the Trial; and as in the same actions some previous demand of the Warrant or authority under which the Defendant acted is required, if it is not attended to, the Plaintiff will be nonsuited: it must therefore, be particularly observed in those Actions,—

1. If the Action is against *Justices of Peace*, that notice of an Action, intended to be brought against them, must be given one month before it is brought by Stat. 24 Geo. II. c. 44. And the Justice in every case, where he is acting by colour of his authority, is entitled to this notice, although his act on which the Action is brought is contrary to law. As where a Magistrate acted alone, and made an order which required the concurrence of two, he was held to be

entitled to notice. (*a*) So where a Magistrate for a limited jurisdiction granted a warrant for what was done out of it, he was held to be entitled to notice. (*b*) It should therefore be taken as indispensable, in every case. See *post* for the form of that notice, and how it is to be acted on.

2. If the *Action is against a Constable or Peace Officer*, a demand of a perusal and copy of the Justice's Warrant must be made on him, if he was acting under a Warrant. This perusal and copy he is allowed six days to give, during which time no action can be brought against him. If he gives a perusal and copy within that time or before action brought, he is entitled to have the Justice made a Co-Defendant with him by Statute 24 Geo. II. c. 24., and the warrant is to him a sufficient justification : but if he has refused or neglected to give it for six days, and an Action is brought against him, his warrant is no protection, and he is proceeded against as a private person.

And the Action against Justices of Peace, or Constables acting under their warrant, must be brought within six calendar months after the act committed, for which the Action is brought by Stat. 24 Geo. II. c. 44. s. 8. But if the Constable was acting without a warrant, the statute does not apply ; and the Action may be brought at any future time within the Statute of Limitations. (*c*)

(*a*) Weller *v*. Toke, 9 East. 364.

(*b*) Prestidge *v*. Woodman, 1 Barn. and C. 12.

(*c*) Postlethwaite *v*. Gibson, 3 Esp. N. P. C. 226. See *post plenius* in this Chapter.

3. Officers of the Excise and Customs must have one month's notice of Action by Stat. 23 Geo. III. c. 70.; of all which notices having been given, the Plaintiff must be prepared with Evidence at the Trial. I shall, therefore, now proceed to consider:—

1. *The general Evidence for the Plaintiff in these Actions.*

1. In settling the Evidence in these Actions it is first necessary where any preliminary matters are required to be done by the Plaintiff, and which must be given in Evidence at the Trial, such as those just stated, to see that they have been complied with. As in an Action against *a Justice of Peace*, who must have a Copy of the notice of Action served on him, the Justice should have notice to produce it, and it should be seen that the regular and prescribed form as directed by the statute has been complied with. (*d*) The witness who served it must be called to prove the service as there directed: he should also have the writ in Court, to shew that it was sued out within six months after the cause of Action accrued, as after that time the Plaintiff would be barred. The residue of the Evidence is that of the facts.

2. So in an Action against a Constable or Peace Officer, where he has given a perusal of the warrant, and a copy of it to the Plaintiff. In settling the Plaintiff's Evidence, it must be observed, whether the

(*d*) Tidd's Pract. Form. 1.

Justice is a Co-Defendant on the record or not, and which he must be under Stat. 24 Geo. II. c. 44. The warrant is sufficient Evidence for the Constable, and he must produce and prove it, and it being so established to be the Justice's, the Justice must go into Evidence in his defence, the Plaintiff being only called upon to prove the facts of the case. How far the warrant justified the Act of the Defendant is matter of law at the Trial.

If the Defendant gave no copy of his warrant within six days, or before action brought, he is then entitled to no protection under the Act: but as he may have had a warrant, or is a known officer, the Plaintiff should be prepared with Evidence of the demand of the perusal and copy of the warrant; and shew that neither have been complied with. For which purpose he should call a witness who heard the demand made; and if it was by writing, proof be given of the service of it, and a copy produced. The day of the date of the demand must be accurately proved. The writ should then be in court to be produced to shew that it was not sued out till the six days had expired. The rest of his Evidence are the facts complained of.

3. The notice to the Officers of Excise or Customs is proved the same way.

The Rule as to settling Evidence in Actions of Assault or false imprisonment is the same. In all cases the Plaintiff in both Actions, in proof of his Declaration, is to go into the facts of the Assault or detention of the Person at full length, proving the manner in which it was done; the violence or publi-

city of it; the extent of the bodily injury, if an Assault only; and the length of time the Plaintiff was detained, if false Imprisonment. The place where he was confined, if it was an unusual or improper place, or noisome or unwholesome, is matter also fit to be gone into; and if special damage is laid, Evidence of that should be fully given.

As for an Assault on the Wife, they both join in the Action. Where Husband and Wife are Plaintiffs or Defendants, their Marriage must be proved.

The Evidence for the Plaintiff must, therefore, necessarily depend on the various circumstances of the case, and be governed by them. These general Rules should, however, be observed:—

1. That if the Declaration contains but one Count, the Plaintiff can go into Evidence of one Assault only; and if, in proof of his case at Nisi Prius, he calls Evidence to prove an Assault at a particular time and place, and fails, he cannot go into Evidence of another Assault at a different time and place. (*e*)

In settling the Evidence therefore, if more Assaults than one have taken place between the Plaintiff and the Defendant, and there is but one Count in the Declaration, the proofs should contain Evidence of one Assault only, and that the most violent, and the best proved; further Evidence being inadmissible. But if there are more Counts than one, the Plaintiff may go into Evidence of them; or if the trespass is laid with a *continu-*

(*e*) Stante *v.* Pricket, 1 Campb. 473.

ando, he may go into Evidence of any number of Assaults within the days laid in the *continuando*. (*e*)

2. The Plaintiff is not tied down to the *day or place* mentioned in the Declaration; but may give Evidence of an Assault on any day or in any place previous to the bringing of the Action; as sea batteries, *e. g.* are laid with a *scil.* of a particular County, and tried there.

3. Whether the action is trespass *quare clausum fregit*, or *De Bonis asportatis*, the Plaintiff must *prove himself to be in possession.* It is not sufficient that he had a good title either to the close or goods. (*f*)

4. The Plaintiff, though his Declaration concludes, "And other wrongs then and there did, &c." cannot go into Evidence of any matter which might have been put on the Record as substantive matters of injury or complaint; for in such case they must be stated. (*g*)

As where the Declaration for False Imprisonment concluded in the common form "*and other wrongs, &c.*"; and the Plaintiff in one case wanted to go into Evidence to prove, "That during his confinement, (*h*) he had been stinted in his allowance of food:" it was held that it could not be

(*e*) Bull. N. P. 86.

(*f*) 1 Roll Ab. 553. Gordon *v.* Harper, 7 T. Rep. 9. Ward *v.* Macauley, 4 T. R. 489. 1 Esp. Dig. N. P. 398.

(*g*) 1 Esp. Dig. N. P. 354.

(*h*) Lowden *v.* Goodrick, Peake's N. P. C. 46.

done. And in another case, where he wanted to go into proof of his having, during his confinement, caught the Gaol fever, (*i*) it was ruled by Lord Kenyon that such Evidence was inadmissible.

5. Where the Defendant justifies, and the Plaintiff's Replication is the general one of "*De injuriâ suâ propriâ,*" he is confined to a disproval of the facts stated in the Plea, and cannot give in Evidence any extrinsic matter not contained in it. (*k*)

As where the Defendant to False Imprisonment generally justified the Arrest, and the detention under a Warrant, it was held that the Plaintiff could not go into Evidence, under that general replication, of a *Tender and refusal of Bail.* (*l*)

In settling the Evidence therefore for the Plaintiff in these cases ; it would be filling the brief with inadmissible Evidence to state any Evidence of injuries not within the Declaration, by reason of the general words, and *other wrongs then and there did* : but if he has laid any special damage arising from the Assault, as if he lost a limb by which he was unable to earn his living, Evidence of that should be brought forward, and stated in the proofs. So under the general Replication of *De Injuriâ suâ propriâ,* the attention to be applied in settling the Plaintiff's Evidence is, to disprove the facts stated in the Defendant's, and to those he must attend.

(*i*) Pettit *v.* Addington, Peake's N. P. C. 62.
(*k*) 1 Esp. Dig. N. P. 354.
(*l*) Sayre *v.* Earl of Rochford, 2 Black. Rep. 1165.

As, therefore, the facts to be proved by the Plaintiff are of such limited extent, the important matters of Evidence in this Action occur in the defence. The head, therefore, material here to be considered is:

The settling the Evidence for the Defendant under different Pleas.

The Defendant has three modes of defence by Plea: 1. Of the General Issue *Not Guilty*. 2. *Of matter of Excuse*, as that the injury was done by accident: but which, as it may be given in Evidence under the General Issue, is, therefore, rarely pleaded. And, 3. *Of matter of Justification* in point of law.

In settling the Evidence which may be given under the Plea of *Not Guilty*, it must be considered, as produced either as an answer to the Action, or in mitigation of damages; and in that view must be considered distinctly.

1. *Of the Evidence under the Plea of Not Guilty as an answer to the Action.*

This in that respect is a denial that the facts stated by the Plaintiff amount to an Assault, Battery, or Imprisonment. Not Guilty is the General Issue in these Actions, and puts the Plaintiff upon proof of his Declaration.

That is, to prove by Witnesses all the circumstances

of the Assault or false Imprisonment, as they took place; as before stated.

In the case, therefore, of common persons, the Defendant under this Plea can only call witnesses to disprove the Plaintiff's case; and to prove that he is falsely charged with the injury complained of; by shewing, for example, that the Plaintiff was mistaken in his person, and that the injury was committed by another. This is done by proving who actually committed the Assault on the Plaintiff, or that the Defendant was not present, or took no part in it.

So, to shew that the facts stated do not support the Charge under this Plea, in the case of False Imprisonment, the Defendant may prove that the Plaintiff *voluntarily submitted to the coercion or detainer of his Person* without any violence used toward him. For it has been decided, that if a Constable, having a Justice's Warrant, shews it to the party against whom it is granted, and he voluntarily and without compulsion goes before the Magistrate, who dismisses the complaint, this will not constitute False Imprisonment. (*m*)

This fact being given in Evidence by witnesses, is an answer to the Action under the plea of Not Guilty.

The Defendant under this Plea may go into Evidence, to shew that the Action has been ill brought, and so nonsuit the Plaintiff: as if one Tenant in Common brought an Action of Trespass *quare clausum fregit,*

(*m*) Arrowsmith *v.* Lemesurier, 2 N. Rep. 211.

in which Action all the Tenants in Common ought to join, (*n*) the Defendant may prove, that there were other Tenants in Common who ought to have joined.

But in the cases of Justices of the Peace, Constables, Parish Officers, and Officers of the Revenue, by several Statutes they are allowed to give a justification or any special matter in Evidence, without pleading it, under the General Issue only. These cases will be referred to hereafter.

2. As under this Plea of the General Issue, *matter of excuse* may be given in Evidence, the General Issue only is in most cases pleaded: in fact I have rarely known matter of excuse pleaded, as it is unnecessary. It must however be made out in Evidence. *Inevitable Necessity* comes under this head, as well as accident. As, to Trespass for running over the Plaintiff by Defendant's carriage, and injuring him, the Defendant may shew, that his Horse became ungovernable and ran away with him, and ran against the Plaintiff: for if the accident happened without his default, it would be a good defence. (*o*) So is *Amicable Contest,* good matter of excuse; as if two wrestled for a Wager, and one was hurt by accident; if this is proved, it is a good answer to the Action.

3. The important matter in settling the Evidence for the Defendant, is the Evidence which he is to

(*n*) Litt. s. 313.
(*o*) Wakeman *v.* Robinson, 1 Bing. 213.

give under the Pleas of Justification. These Pleas are, of course, of great number and variety ; I shall, therefore, apply myself to the Evidence required as to the principal ones only, 1st the *general* Pleas of Justification ; and, 2dly, as they apply to the *Person.*

The *general* Pleas are *Son Assault Demesne,* and *Molliter Manus Imposuit :* the Pleas to the *Person,* are, 1. The General Issue, in case of Justices of Peace, Constables, &c. 2. The Special Pleas of Justification of the Sheriff, his Officers, and others : each of which will be taken in their order.

1. *Of the Evidence under the Justification of Son Assault Demesne.*

It is usual to plead Not Guilty as well as a Justification in all Actions, as the Plea of Not Guilty puts the Plaintiff upon the proof of his Declaration, as before stated : and where it is so pleaded, the Defendant is called upon to prove the facts in justification as stated in his Plea.

If the Defendant pleads Son Assault only, and the Plaintiff replies *De Injuriâ suâ propriâ,* the Defendant admits that he did assault the Plaintiff, and he begins his case, by proving an Assault made by the Plaintiff upon him : this he may prove to have taken place at any day before the Action brought, and is not confined to that laid in the Declaration ; and if the Plaintiff cannot answer the Assault *of that day,* he will have a Verdict against him, for he is not allowed to go into Evidence of an Assault or Battery at another day or place than that

laid in the Declaration. (*o*) This should, therefore, be attended to in settling the Evidence. If there is a plea of Not Guilty, as well as of Son Assault, the Plaintiff begins his case by proving the facts of the Assault, and the Defendant is bound to justify *that Assault* under his Plea: but if the Defendant has pleaded Son Assault only, and there is the General Replication *De Injuriâ, &c.* he is not required to be prepared with any Evidence respecting the Assault on the day in the Declaration, unless he means to justify that assault; for if there have been more than one, he should confine his evidence to an Assault on a different day, as the Plaintiff cannot be prepared to answer it. (*p*)

This Plea of Son Assault, if it is to be applied to the day laid in the Declaration, is proved by the Defendant at the Trial, by shewing, that before he assaulted the Plaintiff, the latter had assaulted him. It is not necessary that this should be by striking him, but by shewing, that he, the Plaintiff, was in the attitude, or about to strike, or wound him, which he averted by assaulting the Plaintiff. It will not be sufficient for the Defendant to shew a mere menace or threatening posture assumed by the Plaintiff, where the Parties were so far asunder that the Plaintiff could not reach the Defendant; he must shew that he was at the time within reach of the Piaintiff. These facts must, of course, be proved by some witness who happened to be present when the Assault took place, and who can prove them in Evidence.

(*o*) Vid. Randle *v.* Webb, 1 Esp. N. P. C. 38.
(*p*) Downes *v.* Schrimsher, Brownl. 233.

But where Son Assault only is pleaded, the only Evidence which is necessary for the Defendant to bring forward is; to prove an Assault made by the Plaintiff upon him, on any day before action brought: but it must be observed that that is, where the replication is *De Injuriâ*, &c. only; for the Plaintiff may *new assign and make the day material*. If he does so, the Defendant must give an answer to the day so fixed, either by pleading Not Guilty, or by a Justifiation. If he does not, the Plaintiff will have a Verdict.

2. *Of the Evidence under the Plea of molliter manus imposuit.*

This is a justification of an actual Assault, but which was caused by the act of the Plaintiff himself; and which the Defendant was justified in making either to prevent him from doing some unlawful or injurious act, or resisting him for some lawful cause; and the matters so justified are of great variety.

As, if the Plaintiff came into Defendant's house without any authority, or even on a lawful occasion, but refused to depart, on being required to do so; Defendant may lawfully use force to expel him; and if, in such contest, the Plaintiff is assaulted and hurt, the Defendant can justify it by a Plea of those facts, in which case the Defendant must prove: that the House was his; that the Plaintiff came into it, either without his licence, and upon no lawful occasion; or for a lawful purpose, as, that it was a Public House, into which he might lawfully come; but that when there, he misconducted himself, made a noise or riot, or offended the other guests; that he was requested to depart, which he refused, and that it was necessary

to have recourse to force to compel him; that Evidence would be sufficient.

These two last mentioned matters of Evidence as to the request and the force used, must be attended to, and strictly proved. As to the first, because no wrong is done, until the Plaintiff has refused to depart on request: and as to the second, the Plea must be justified by the necessity to have recourse to force. For though an Assault may be justified by a refusal to depart, if the Defendant justifies the *battery*, he must shew a resistance on the Plaintiff's part to do so, or an opposition by force; for if he could be turned out of doors or off the Land by mere force, (*q*) there was no necessity to beat or bruise him; and they can only be necessary or warrantable where he opposes the attempt by violence; but a *wounding*, under any circumstances, cannot be justified under this Plea.

So if the Plaintiff came into the Defendant's Close for any unauthorised purpose, and is desired to depart, which he refuses, force is justifiable under this Plea to compel him. (*r*) In both cases, the Evidence is the same; and the better opinion seems to be, that there is no necessity for the Defendant to shew his title to the House or Close, nor need he go into any Evidence on the subject, but that he may rely on the possession only: but there are contradictory cases. (*s*)

(*q*) Williams *v.* Jones, 2 Stra. 1049. Vid. 5 Comyn's Dig. Pleader 3 M. 16. Gregory *v.* Hill, 8 T. R. 299.

(*r*) Green *v.* Goddard, Salk. 641. Weaver *v.* Bush, 8 T. Rep. 78.

(*s*) Skevill *v.* Avery, Cro. Car. 138.

In all cases of Evidence under this Plea, it must be taken as a general rule, that to warrant the Plea, the act of the Plaintiff was unlawful, and that the force and violence used by the Defendant to the Plaintiff were necessary and unavoidable; for under no other circumstances can force and violence be justified, and the Defendant must give clear Evidence of both.

As, for example, if the Plaintiff was diverting the Defendant's Water-course: (*t*) rescuing his Cattle which Defendant had taken as a distress, or in execution; the Defendant must prove that the Water-course was his; that he had lawfully distrained the Cattle, or taken the Plaintiff's Goods in execution; in the one case by shewing a Tenancy, or that the Cattle were damage feasant, and in the latter by proving an execution issued, and the Cattle seised under it by the officer; and then that the Plaintiff violently and unwarrantably resisting, was opposed by the Defendant, and in the course of such opposition received the injury for which the Action was brought.

These Rules apply to every case of this Plea.

Where the Defendant justifies for such causes, the Plaintiff may *new assign* "that what the Defendant did was excessive or unnecessary." This Evidence depends on the circumstances which took place at the time, and which the Plaintiff must be prepared by

(*t*) 2 Roll. Ab. 547.

witnesses to prove: but if the Replication is *De Injuriâ suâ propriâ,* he denies the Defendant's Plea, and then his Evidence at the Trial is to disprove the facts of the Defendant's Plea only.

This difference must be therefore attended to in settling the Evidence.

3. If the Defendant *justifies on the ground of moderately chastising an Apprentice or Servant,* he must give Evidence that they are so, by shewing the Indenture of Apprenticeship, and proving the execution of it in the first case: and by shewing that the Plaintiff in the other was his Servant and in his employment; and he must give Evidence of the faults committed by them, such as disobedience of his commands for example, to shew that the offence warranted the punishment he inflicted.

These Pleas apply more especially to the Action of Assault: as to false Imprisonment they are more numerous, and are chiefly matters of justification of the alleged Imprisonment under some lawful authority; such as Pleas by Magistrates, Constables, &c. And these may be,—1st. In cases of Imprisonment where no Process has issued. 2dly. Where it has issued. And, 3dly. As to the Pleas applying to the Person.

1. *Of the Evidence in cases of a Justification of Imprisonment without Process, by Constables, Peace Officers, or others.*

Under this head it may be observed, that in the

cases of false Imprisonment against Justices of the Peace, Constables, and all Peace Officers, as well as Officers of the Customs and Excise, for acts done connected with their Offices, it is *not necessary to prove their appointment*, but merely that they acted in those characters, (*u*) of which, Evidence must be produced.

1. *In the case of Constables or Peace Officers.*

If any Person makes a Riot, Assault, or breach of the Peace, he may be taken into custody, given in charge to a Constable, or other Officer, to be brought before a Justice of Peace, without any warrant to authorize it: or the Constable, on his own view of such proceedings, may take him into custody. This justification, it has been before observed, need not be specially pleaded, but may be given in Evidence under the general Issue. Where it is relied on, the Defendant must call witnesses to prove a Riot, Assault, or Affray having taken place; that the Plaintiff was concerned in it; and that it was necessary, to prevent a continuance or a repetition of the violence, that he should be taken into custody; that he was then given in charge to the Constable or Peace Officer under the charge. It is sufficient, if he acts as a Constable, to give general Evidence that he is so. If he was present, and the offence was committed in his view, he would be clearly warranted in taking the Plaintiff into custody by his own authority; and it seems also that, though not present, he can

(*u*) Phillips on Evid. 180.

justify the detention after he was charged with him. As, however, the Constable only takes charge of the Plaintiff to be dealt with according to law; the last proof must be, that the Plaintiff was brought by him before a Magistrate, and discharged or committed. This is matter of proof by witnesses: but the fact of an actual charge before a magistrate, must be proved by the magistrate himself, or his clerk who took the depositions, which should be produced and proved. A *subpœna duces tecum* to the magistrate or his clerk is in this case therefore necessary, in order to have the proceedings brought forward at the Trial.

A Constable, Watchman, or *Peace Officer,* is also warranted in taking *a person into custody on suspicion,* and where the Action is against them for Imprisoning the Plaintiff under such circumstances, the Defendant must shew in Evidence, at the Trial, the circumstances under which he took the Plaintiff into custody, (*u*) and of his being found under suspicious circumstances, such as *e. g.* with property supposed to be stolen at an unseasonable hour of the night: these are good justifications for an Officer without a Warrant: and, if proved, will entitle the Defendant to a verdict. (*v*)

So a Constable can justify taking a Party into custody, on a charge of felony, without any Warrant. (*x*)

(*u*) Mure *v.* Kaye, 4 Taunt. 34.

(*v*) Lawrence *v.* Hedger, 3 Taunt. 14.

(*x*) Samuel *v.* Payne, Dougl. 345. Hobbs *v.* Branscomb, 3 Campb. 420.

In that case he must shew in Evidence, that a charge of Felony was preferred before him, and that the Plaintiff was charged with it; and if the charge was in writing, it should be produced and proved: but he is not called upon to prove a Felony actually committed, for he will be justified, whether a Felony was committed or not.(*y*)

But if a Felony has actually been committed, either an Officer or Private Person may justify taking a Person into custody, on fair grounds of suspicion. (*z*) But these grounds of suspicion must be given in Evidence, to shew, that they were such as warranted the apprehending of the Plaintiff; such as his being seen near the place where the Felony was committed, and the like.

2. *Commanding Officers of the Navy or Army* (*a*) may also justify the Imprisonment of their Officers, Soldiers, or Crew, for misconduct: so may the *Master of any Ship or Vessel,* for preventing such misconduct as may endanger the Ship. But in all those cases the Defendant must shew, that he was such commanding Officer or Master of the vessel, and the Plaintiff under his command and subject to his controul. He must then prove what act of disobedience, mutiny, or insubordination, the Plaintiff was guilty of to warrant his Imprisonment, which is done by witnesses. And note, that it must, in every case of a justification for Imprisonment, be attended to; that

(*y*) Samuel *v.* Payne, Doug. 345. Stonehouse *v.* Elliott, 6 T. Rep. 315.

(*z*) 1 Esp. Dig. N. P. 353.

(*a*) 1 Esp. Dig. N. P. 354. Swinton *v.* Molloy, cit. 1 T. R. 537.

the Defendant must prove the ground of the detention of the Plaintiff's Person clearly and distinctly in every respect, on account of the jealousy with which the law looks on the Imprisonment of the Person of the Subject. And, except in the cases before mentioned of Magistrates, Constables, &c. the justification must be pleaded.

Arrests also by *private persons* for breaches of certain statutes are allowed, without any warrant, and on actions brought for such arrests are well pleaded in bar. Such as the Stat. 1 Geo. 4. c. 56. for breaking and destroying fences, under the Stat. for offences against the General Highway Act: if such justifications are pleaded, the Evidence must bring the offence within the statute; as to shew in the first case, what and whose fences the Plaintiff was breaking or injuring when taken into custody, and in the last that the offence was done in a *common and public King's Highway*. (*a*)

2. *Of the Evidence in Justification of Imprisonment under Process: this may be by the Sheriff or his Officer, in Civil Actions; or under the Warrant of a Magistrate, by a Constable, Peace Officer, or other.*

1. *Of the Evidence in Justification of Imprisonment under Process in Civil Actions, against the Sheriff, his Officer, or others.*

The arrest under Process from any of the Courts may be unlawful, and subject the Party who makes it to an Action for false imprisonment. 1. Where

(*a*) Vid. Foster's Cr. Law 154, as to Impressing Seamen.

the *Person arrested is not liable to be arrested,* as in the case of an executor or administrator, in which case the Plaintiff must prove himself to be the executor or administrator, by producing the Probate of the will or the letters of administration to the Persons for whose debt he was arrested. (*b*) 2. Where the *Writ or Process* under which he was arrested *is void,* as on a Writ of mesne process where a term intervenes between the time of the suing it out and the return. (*c*) This is proved by the production of the writ itself, or an examined copy of it. 3. Where a party is arrested by *process which is irregular, or issued without authority.* (*d*) Or, 4. *If the arrest has been made on a Sunday.* (*e*) It is therefore obvious that, in settling the Evidence in these cases, the objection to the writ will in some of them appear on the face of the writ itself: but in the other matters it is the subject of *vivâ voce* testimony, such as, that the day of the arrest was Sunday.

In settling therefore the Evidence where an Officer or private Person justifies under Process, the writ itself is first to be looked to, to see that it is not void or irregular; and that it was regularly taken out and returnable. (*f*)

If an Action is brought against an Officer or *private Person* for false Imprisonment, as, *ex. gr.* where the arrest was for Debt, the Defendant must plead a full

(*b*) Barker *v.* Braham, 3 Wils. 368.
(*c*) Parsons *v.* Lloyd, 2 Black. Rep. 845.
(*d*) *Vid.* 1 Esp. Dig. N. P. 348.
(*e*) Wilson *v.* Tucker, Salk. 78.
(*f*) *Vid.* Cas. 1 Esp. Dig. N. P. 348.

justification under the Process of the Court, (*g*) stating the writ under which the arrest was made. If it was under Process from an inferior Court, the Evidence must shew also, that the Party was subject to its jurisdiction. Under such *Plea by the Sheriff or his Officer*, (*h*) the Defendant must produce and prove an examined copy of the Writ, or the Writ itself, which it must appear was returned; the indorsement on it will shew, for what sum the Defendant was to be arrested, or taken into custody: this is indispensable. (*i*) He must then shew a Warrant made out to an Officer of the Sheriff; and if the Officer is a Defendant, that a Warrant was made out to *him*, which should be produced.

For this purpose a notice must be served on the Officer if he is a Defendant, and also on the Sheriff the other Defendant, to produce the Warrant. As this Warrant may not be produced at the Trial, the under Sheriff should always be subpœnaed to prove that it was granted by the Office to that Officer.

The under Sheriff can always prove the receipt of the Writ at the Office, and state to what Officer the Warrant was directed. But if the Action is against the Sheriff only, the Officer to whom the Warrant was directed should have a *subpœna duces tecum* of the warrant, as that connects his acts with the Sheriff; and the indorsement on the Writ is not sufficient, unless proved to be the handwriting of the Officer or made by his authority. (*k*)

(*g*) 1 Esp. Dig. N. P. 348.
(*h*) Martin *v.* Bell, 1 Stark. 413.
(*i*) Drake *v.* Sykes, 7 T. R. 113.
(*k*) Hill *v.* Leigh, Holt's N. P. Rep. 216.

If the writ has been returned by the Sheriff, it is usually indorsed in the Office with the name of the Officer to whom the warrant is made out, that indorsement if made by the under Sheriff or one authorized in the Office, has been held sufficient to identify the Officer; for in settling the Evidence it must be attended to, that the Sheriff *must* be connected with the Officer by means of the Warrant. (*i*) The Defendant should, lastly, prove the arrest by such Officer; and if any Person is joined in the Action with the Officer, who assisted or was present with him when the arrest was made, he has a justification, as coming in aid of the Officer, which must be proved.

The Defendant who arrested the Plaintiff may justify an Assault and Imprisonment, by reason of *the misconduct of the Plaintiff* himself, by pleading that he arrested the Plaintiff under process, and because he conducted himself in a violent manner, and could not otherwise be kept in safe custody, did a little push him, he must in that case give the writ in Evidence, and also prove the arrest and resistance of the Plaintiff; and where the Defendant produced the writ only directed to him, the Plaintiff had a Verdict. (*k*)

If the *Plaintiff in the original Action*, or a Stranger, is either the Defendant alone, or jointly with

(*i*) Wilson *v.* Norman, 1 Esp. N. P. C. 154. M'Neil *v.* Perchard, 1 Esp. N. P. C. 263. Tealby *v.* Gascoine, 2 Stark. 202. Morgan *v.* Brydges, 2 Stark. 314. Hill *v.* Sheriff of Middlesex, 7 Taunt. 8. Blatch *v.* Archer, Cowp. 63.

(*k*) Phillips *v.* Howgate, 5 Barn. and Ald. 221.

the Officer, all the Evidence last mentioned must be given, and *also* an examined copy of the *Judgment* in the original Action, if the arrest is on final Process, and on which that Writ is founded, must be given in Evidence at the Trial.

Such is the Evidence required when the *Process is out of the* superior Courts: but where the *Process is from the inferior Courts,* the same Evidence as to the writ, warrant, &c. as above stated, is to be prepared for Trial. But, in addition to it, he must prove, that the cause of Action on which the arrest was made, arose within the jurisdiction of such inferior Court. As if the arrest was under a Marshalsea Court writ, the jurisdiction of which is confined to the verge of the Court, that is, to a certain number of miles round London; the Defendant must give Evidence where the cause of Action arose; and that it was within the jurisdiction of that Court. (*l*) But he is not called upon to go into any Evidence of the proceedings of the court below. (*m*)

2. *Of the Evidence in justification of the Imprisonment under a Warrant from a Magistrate, by Constables, Peace Officers, and others.*

In Actions against a Constable, or Officer acting under a warrant, it has been before observed, that in order to settle the Evidence, it is necessary to see, when he is sued alone, or joined with the Justice of Peace; if sued alone, where the Justice should

(*l*) Johns *v.* Smith, Cro. Jac. 314.
(*m*) Adams *v.* Freeman, Sayer 81.

be joined with him, the Defendant must under the Statute 24 Geo. II. be entitled to a Verdict. But he may be sued alone, 1. Where he has no Warrant, but is acting by his own authority. 2. Where he was acting under a Justice's Warrant: but a perusal and copy of it having been demanded, he has not given a copy within six days, or before Action brought. (*o*) Or, lastly, where he had a warrant; but exceeded, or did not follow its authority.

Where a Constable or Peace Officer has either no warrant: has not given a copy in time: or has done any thing by his own authority without any interference of a Magistrate: or has not acted within the authority given by one: there is no necessity for demanding a copy of a warrant: such as, where it is known that he could have no warrant for what he has done; and he is therefore in that respect as a common person; the cause of Action merely is required to be proved. And though the Constable in fact has had a warrant, yet it has been held, that the Plaintiff might maintain an Action against him without demanding a perusal and copy of it, in a case where what he has done could not be authorized by any Justice's warrant whatever; or, as it is usually expressed, where he was not acting in obedience to the warrant, but under colour of it. As where a Constable, having a warrant to levy a distress for a Poor's rate, *broke into the house*, and demolished the windows, or if he

(*o*) Esp. Dig. N. P. 358.

broke open the door without demanding admission,(*p*) as such acts could not be justified under a Justice's warrant, it was held that there was no necessity for demanding a perusal and copy of it; (*q*) for the statute meant to protect the constable who was acting under the authority of the Justice's warrant, and to make the latter answerable, there could be no necessity for demanding a copy of that warrant under which the Justice could not be liable; it is however advisable, in every case to demand a copy and perusal of the warrant, as it is a preliminary step, and often raises objections at the Trial. Where the Plaintiff has got the copy of the Constable's Warrant, in settling the Evidence, it will be easily ascertained whether, what the constable did was warranted by the warrant or not. If it was not, the Justice need not be joined in the Action.

It was formerly not necessary to demand a copy where the Constable was acting out of his jurisdiction: the law was, that if a Justice's warrant was directed to him, describing him as Constable of a certain parish, he could not execute the warrant out of that parish. But that if the warrant was directed to him by name without the addition, he might execute it any where within the Justice's jurisdiction. (*r*) But the Law is now altered: by Statute 5 Geo. 4. c. 18. s. 2. Constables may execute Justice's Warrants out of their own

(*p*) Launock *v.* Brown, 2 B. and A. 592.

(*q*) Bell *v.* Oakley, 2 M. and S. 259.

(*r*) Rex *v.* Weir, 1 B. and C. 288., and *vid.* Blatcher *v.* Kemp, 1 H. Black. 15. in not.

Parishes, any where within the Justice's Jurisdiction: so that now a copy in such cases should be demanded.

In all cases where the arrest has been made under a Warrant from a Justice of the Peace, the Warrant must be produced in Evidence; and by Stat. 24 Geo. 2. c. 44. it is a justification to the Constable, the statute declaring, "That on producing the warrant the Jury should find a verdict for the Defendant, though the Justice had no jurisdiction:" but it must be proved to be the Warrant of a Justice of Peace for the County, and the signature to it must be proved to be his hand-writing. And this may be given in Evidence under the Issue of Not Guilty, which is pleadable by that Statute.

Wherever, therefore, the Constable is sued alone, the Plaintiff being by the same Statute restrained from bringing an action against a Constable until he has made a demand of the perusal and copy of the Warrant, and there has been a refusal of it for six days; *where a copy has been given of it* to the Plaintiff, in settling the Evidence, it must first be attended to, to see that the Statute required (if the Warrant was sufficient,) that the Justice who issued it should have been made a Co-Defendant with the Constable; as, if he was not, the Defendant would be entitled to a Verdict under the Stat. 24 Geo. II. before cited. And if the Constable is sued alone after he has given the perusal and copy, he may shew that the writ was sued out before the six days,

within which he is allowed to give the perusal and copy of the Warrant to the Plaintiff, had expired; or that in fact he had given it before the writ was sued out; in either of these cases he would nonsuit the Plaintiff. He should therefore, in all cases, have to produce at the Trial, the demand in writing which was served on him of the perusal and copy of the warrant, and be prepared to prove the time of the service of it, to ascertain, whether six days had elapsed from the time of the demand before Action brought; and for which purpose, he should also have the copy of the Writ served upon him to produce, as on proving the actual time of the service of demand and the date of the Writ it may nonsuit the Plaintiff. So he may prove that he gave a copy *before Action brought;* for although he may not have given a perusal and copy of the Warrant within six days after demand of it, (s) which would deprive him of the benefit of the Statute had the Action been immediately brought, yet if he has given a copy at any time *before Action brought,* he brings himself within the protection of the Statute; and if sued alone without the Justice being joined in the Action, he will be entitled to the verdict.

The Constable is not called upon to prove the legality or the illegality of the warrant. (*t*) The Justice of Peace who issued it, is alone answerable for it: he is, therefore, by the Stat. 24 Geo. II. made a necessary Defendant; and as the Constable would be entitled to a Verdict and his Costs, in con-

(*s*) Jones *v.* Vaughan, 5 East. 445.

(*t*) Price *v.* Messenger, 2 Bos. and Pull. 158.

sequence of producing the Warrant, if it is illegal, the Justice is made liable to pay the Costs which the Plaintiff would have to pay to the Constable.

The law laid down with respect to Constables is the same in the case of Actions against *Overseers of the Poor* distraining under a Justice's warrant; (*u*) and so is a *Churchwarden* acting under a warrant of a Justice, they are Officers within the words of the Stat. 24 Geo. 2. and entitled to have the Justice under whose warrant they acted joined with them. (*x*) In settling the Evidence in Actions against them, the same rules are to be observed.

As the suing out of the Writ is the commencement of the Action, the Plaintiff's Attorney, or the Defendant's in case he means to raise the objection as to the informality in commencing the Action, should have the Writ at the Trial to shew the time of the actual commencement of it, by producing the Writ, or the first Writ if there has been an *Alias;* for as the Sut is often commenced on an *Alias* Writ, which has issued after six months, the first not being served; though the suing out of the first Writ would save the Action, the production of the *Alias* would not. It is, therefore, indispensable for the Party who means to use it as Evidence to have at the Trial, where that is the case, the first Writ as well as the *Alias,* and to shew the first returned, (*y*) either, by the production

(*u*) Bull. N. P. 24.

(*x*) Harper *v.* Carr, 7 T. Rep. 270.

(*y*) Harris *v.* Woolford, 6 T. Rep. 617. Weston *v.* Fournier, 14 East. 491.

of the Writ itself, or an examined Copy, in which the return will appear.

Of Settling the Evidence for the Defendant in Actions against Justices of the Peace.

As to this it has been previously observed that as the Defendant is entitled to a month's notice of Action, and which the Plaintiff is bound to prove at the Trial; the same caution, as before stated in the case of Constables, is to be attended to in this case, as the Defendant may avail himself of the objection to the Action being brought too soon, or of the notice being bad. For this purpose the first step is to see that the notice is regular, and that it has the requisites directed by the Stat. 24 Geo. 3. sess. 2. ch. 44. These are, that it should be in writing; and state, 2dly, the intended Writ or Process, as *Capias, Latitat, &c.*:(z) 3dly, it should express the cause of Action, as *e. g.* for falsely imprisoning, &c.: 4thly, it should be indorsed with the Christian and surname of the Plaintiff's Attorney, and so describe him and his place of abode; (*a*) and, 5thly, be delivered to the Defendant, or left at his usual place of abode, by the Attorney or Agent of the Plaintiff, one calendar month before the suing out or serving the Writ. For the Plaintiff, this notice must be proved by the Person who served it; who should keep a Copy ready to be given in Evidence, but the Defendant should have notice to produce that served on him. In serving such

(z) Lovelace *v.* Curry, 7 T. Rep. 631.

(*a*) Strickland *v.* Ward, in not. 7 T. Rep. 633.

notice the best way to ascertain the exact day of serving it, is by a memorandum indorsed on it to that effect. The next step, is to see that the Writ and Action conform to the notice, for where the notice was that an *Action on the case* would be brought, and that brought was *Trespass and False Imprisonment,* it was held to be fatal. (*b*) And, lastly, it must be seen that the place of the Attorney's residence is truly set out. An omission of any of these requisites is fatal: (*c*) most of them being objections arising on the face of the notice, are taken at the Trial; the notice should therefore be carefully examined by the Defendant, as any omission or informality will enable him to nonsuit the Plaintiff.

And as bringing the Action after six months have expired is fatal to the Plaintiff's Action, the Defendant should be prepared to prove the actual time when the cause of Action accrued, if he means to avail himself of the circumstance of the Action having been brought too late; so that by comparing it with the Writ, it may appear whether the Action was brought within six months after it or not; as, by Stat. 24 Geo. 2. c. 44. sect. 8. it must be brought within six calendar months after the act committed, or the Plaintiff must be nonsuited. Vid. case of Weston *v.* Fournier, 14 East. 491. *post.* 286. (*d*)

(*b*) Taylor *v.* Fenwick, cit. 7 T. Rep. 635. Osborne *v.* Gough, 3 Bos. and Pul. 551.

(*c*) 1 Esp. Dig. N. P. 358. Lovelace *v.* Curry, 7 T. Rep. 631.

(*d*) 1 Esp. Dig. N. P. 358.

As the Plaintiff, however, gives the notice of Action, he is bound not to proceed until one month has elapsed from that time; therefore, the service of the notice ascertains when the month commences, (*a*) and the day of the service is inclusive.

2. The notice of the Action required by the Statute 24 Geo. 2. c. 44. sect. 2., being to enable the Justice to tender amends, and afterwards to plead it; where he does plead it, he must shew by Evidence at the Trial, that he made a regular tender of the exact sum pleaded within a month after notice of Action given.

The Defendant was in a recent case allowed to pay money into Court after Issue joined, and to withdraw his Plea and plead *de novo* the General Issue,(*b*) which is equivalent to a tender of amends; in which case, if the Jury find it sufficient, there must be a Verdict for the Defendant. He should, therefore, have the Rule of Court to give in Evidence at the Trial, as by it only the sum paid into Court can be ascertained.

3. As a Justice of Peace may either commit a Person for an offence committed by him, or seize the Party's Goods in consequence of a Conviction, or commit him for something which has passed in his presence; it may be necessary to consider them separately.

(*a*) Castle *v.* Burdett, 3 T. Rep. 623.
(*b*) Nestor *v.* Newcome, 3 Barn. and Cr. 159.

1st. If the Action is for an illegal commitment by the Justice, in consequence of Proceedings on an Information, or Complaint exhibited before him, he must accurately prove the regularity of his Proceedings, the Information laid before him, and the Proceedings on it: as these are taken in writing by himself, they must be necessarily produced and verified. (*c*)

But it is different in the case of Convictions.

1. *Where there is a subsisting Conviction.*

If the Plaintiff has been convicted under a Statute, before the Defendant as a Justice of the Peace, and the punishment is Imprisonment, for which an Action is brought; the production of that Conviction is sufficient Evidence for the Magistrate, provided it is good on the face of it. (*d*)

And so if the Action is for imprisoning the Plaintiff by reason of *not paying a penalty* given by a Statute, and which he is empowered to do by stat. 5 Geo. 4. ch. 18. the Magistrate is only required to produce his own Conviction, and prove the Proceedings before him, and his handwriting to the Conviction. The Plaintiff may, however, in both cases, shew, that on the face of it, it is bad in

(*c*) Hill *v.* Bateman, 1 Stra. 710.

(*d*) Gray *v.* Cookson, 16 East. 13.

point of law; and in that case he will have a verdict.

But if there is no defect appearing on the face of the Conviction, it is conclusive Evidence of all the facts stated in it, and the Party affected by it cannot be let into Evidence to disprove any of the matters stated in it. (*d*)

2. *Where the Conviction has been quashed.*

Where the Conviction has been quashed, as it then affords no justification, the Justice has only to rely on the protection of the Stat. 43 Geo. 3. c. 141., to shew that the Conviction and Proceeding were not done maliciously, and without probable cause; for the statute directs, that the Action should not be Trespass *vi et armis*, but an Action *on the Case* only: and it will be a ground to nonsuit the Plaintiff if brought in any other form,

In support of his Conviction, though it has been quashed, the Defendant, the Justice of Peace, may rely on it, and the Plaintiff must bring forward Evidence of what passed before the Defendant, when he made the Conviction; and shew by the facts that he had convicted the Plaintiff without any reasonable or probable cause, and from malicious motives: but

(*d*) Brittain *v.* Kinnaird, 1 Brod. and B. 432.

Defendant may shew that the Plaintiff was guilty of the offence for which he convicted him, which by sect. 2. of the Statute defeats the Action. (*e*)

2. Justices of Peace may also *commit for something which passed in their own presence.* If an Action is brought for so doing, the Defendant must be well prepared to justify his own conduct; such as:

If he justifies a Committal, on account of the Plaintiff's having been guilty of a Contempt of him when in the execution of his Office, (*f*) he must be prepared to shew what the Contempt was, by calling witnesses who were present, and heard what passed; and he must not commit verbally, but by a Warrant specifying the offence, (*g*) which warrant should be given in Evidence at the Trial.

3. So he may commit a Person *for refusing to be bound over to the Assizes, or Sessions, as a witness* on a prosecution for Felony. (*h*) In that case, he must first give in Evidence the charge of the Felony as made before him, to shew that there was ground for binding the witness over, a Felony being sworn to have been committed: secondly, that the witness's Evidence appeared to be material, by shewing to

(*e*) Burley *v.* Bethune, 1 Marsh. 220. 5 Taunt. 580

(*f*) 1 Esp. Dig. N. P. 354.

(*g*) Mayhew *v.* Locke, 2 Marsh. 377. 7 Taunt. 63. S. C.

(*h*) Bennet *v.* Watson, 3 Maule and Selw. 1.

what facts he was called upon to give Evidence; and, lastly, that he was regularly called upon to enter into a Recognizance to appear at the Assizes or Sessions, and that he refused to become bound.

As the charge of Felony in the depositions is made by the Prosecutor alone or with others, they should be produced and proved to be those made before the Justice, and the handwriting or mark of the Prosecutor or other witnesses to them be proved. The materiality of the Party's Evidence, and the fact of his being required to enter into Recognizance, is proved by witnesses.

4. A Justice of Peace may commit a Person for *not paying the penalty on a Conviction,* to levy which a Warrant had been issued, and under which no levy had been made: if the Act, under which the Conviction takes place, require a previous return to it, " that no goods were found on which a levy could be made," which has been made by the Constable, and then goes on, " That after such return and non-payment, the Defendant for default of payment should be imprisoned;" in that case, the Justice should give in Evidence the Conviction of the Plaintiff, the Warrant to the Constable to levy, and the Return as before stated, and then a demand on the Defendant to pay, his failure to do so, and then the copy of the Warrant of committal.

But in the case of a Committal under a Conviction

upon Stat. 13 Geo. 3. c. 80. (*i*) *for killing Game on a Sunday*, the Justice may verbally commit, if the penalty is not then paid, and he has issued his Warrant to levy it, and may order the Party to be kept in custody till the Warrant is returned. In such case, the information before the Justice should be given in Evidence, proof of the fact of the Conviction, and the demand made on the Plaintiff of the amount of the penalty, and the order by the Magistrate to commit, and to keep the Plaintiff in custody until the money directed by the Warrant was paid, the Warrant granted to levy the penalty, and a return that the offender has no goods on which to levy; and which it is now enacted, that he may do by stat. 5 Geo. 4. ch. 18. unless security be given.

If a man be imprisoned under a Justice's Warrant, and kept in custody for some time, as *e. g.* from the 1st of January to the 1st of February, he may bring his Action within six months after the first of February, for it is a continued Trespass. (*k*)

But where *he gives a notice* of proceeding by Action against the Justice on the expiration of a month, he must proceed and bring his Action within six months after the act committed, by the words of the Statute, though it may be a continued Trespass. But

(*i*) Still *v.* Walls, 7 East. 533. 6 Esp. N. P. C. 36. S. C.
(*k*) Pickersgill *v.* Palmer, Bull. N. P. 24.

if the actual proceeding is on an *alias* writ out of time: if the first writ was within it, he may shew the return and continuance of the first writ. He should therefore be prepared with that Evidence at the Trial. (*l*)

(*l*) Weston *v.* Fournier, 14 East. 491.

CHAPTER VI.

OF THE EVIDENCE IN THE ACTION FOR ADULTERY.

THE first step in Evidence, at the Trial of this Action, always is, to prove the Marriage of the Plaintiff with his Wife, whom he charges to have had criminal conversation with the Defendant.

In support of that fact, Evidence of reputation, cohabitation, the admission of, or representation by the Parties themselves, is insufficient. There must be Evidence of the actual solemnization of the Marriage; and that Marriage a legal one.

The usual Evidence of such Marriage, is the production of a copy of the Register of the Marriage Certificate from the books of the Church where the ceremony was performed, which must have been examined with the original. But this may be rendered unnecessary, by producing a witness who was present at the Marriage, and can prove its having taken place: that is the best Evidence of the fact. But as it is not always to be had, it will be sufficient to call Persons who knew the Wife before Marriage, and

of course her maiden name, as described in the Certificate; that she afterwards appeared as the Wife of the Plaintiff, and by his name: the bare Register, without connecting the Parties with it, is not of itself sufficient; for that purpose the proof of their hands-writing in the book may be had, and will be sufficient. (*a*)

If the Marriage has taken place abroad, it must be proved that the ceremony was pursuant to the laws of the country, and the Marriage valid according to those laws: that is a question of law, or received public opinion, which must be proved as a distinct fact. (*b*)

Therefore a Marriage celebrated in Ireland in a private house, by a clergyman of the Church of England without anyEvidence of a Licence, is a good and valid Marriage; for the Marriage Act does not extend to Ireland; and such a Marriage was good, even in England, before the passing of that Act. The fact therefore of such Marriage may be proved by any witness who was present at it. (*c*)

So in the case of marriages celebrated abroad. It was ruled by Abbott, C. J. that the validity of a marriage celebrated abroad must be determined in an English Court of Justice, by the law where the marriage was solemnized; and it therefore was a question of fact, what was the law there. And where the

(*a*) 1 Phillips on Evid. 390.
(*b*) *Vid.* Leader *v.* Barry, 1 Esp. N. P. C. 353.
(*c*) Smith *v.* Manwell, Ryan and M. 80.

marriage had been celebrated in France, he received as Evidence a copy of the Cinq Codes of France, (called the Code Napoleon,) produced by the French Vice Consul resident in London, which book was published and sold in France as containing the laws, which had been bought at a Bookseller's shop at Paris. (*d*)

So any Marriage among Jews, or Sectaries, as Quakers, and the like, if good according to that particular religion, is a sufficiently good Marriage: but it must be proved that it was by the sect received as good, as well as that the Marriage was solemnized according to the ceremonies of that religion.

But a copy of a Register, from a foreign Chapel, of a Marriage solemnized there, is not Evidence. (*e*) Nor are Fleet Marriages.

The fact of the adulterous intercourse between the Defendant and the Plaintiff's Wife must then be proved: (*f*) this, of course, varies with circumstances; and is usually proved by witnesses who have seen the Parties in a situation which precludes any doubt of the fact.

The last Evidence, in this case, goes to the damages: and these depend upon many circumstances: as on the situation in life of the Plaintiff; of the

(*d*) Lacon *v.* Higgins, 2 Dowl. and R. N. P. 38.
(*e*) Leader *v.* Barry, 1 Esp. N. P. C. 353.
(*f*) Reade *v.* Passer, 1 Esp. N. P. C. 213.

degree of happiness and comfort which he enjoyed with his Wife, and the degree of affection which they had previously entertained for each other; on the means by which the Defendant effected the Seduction, as if by being admitted into the Plaintiff's house as his Friend or Intimate, and the abuse made of such confidence and situation; so, that he was the Plaintiff's relative, and in that character received into the family without suspicion; and the Plaintiff's Wife had till then been considered as a woman of chaste morals and character, and that she had children by her Husband. All these matters go in aggravation of the damages.

These facts are generally proved by *vivâ voce* Evidence of Persons who were acquainted with, or lived in intimacy with the Plaintiff and his Wife, and were acquainted with his mode of living and circumstances: but there is written Evidence which is also admissible.

Of this description are letters which have passed in correspondence between the Husband and Wife, where, from necessity, they were living in different places, as shewing their affection for each other. (*g*) This is, however, to be taken with caution, as capable of being adopted by collusion between the Husband and Wife to enhance the damages. The particular situation, at the time the letters passed, should be therefore clearly proved; such as that their separation was unavoidabl; so as to place the correspondence beyond suspicion.

(*g*) Edwards *v.* Crock, 4 Esp. N. P. C. 39.

So, letters written by the Defendant to the Plaintiff's Wife are Evidence against him. (*h*)

Of settling the Evidence for the Defendant.

This is either as an answer to the Action on the Plea of Not Guilty, or in mitigation of damages.

As a defence, the Defendant may give in Evidence, that the Husband suffered his Wife to live openly as a common Prostitute. (*i*)

But his conniving at her Prostitution with a particular Person, it is said, will only go in mitigation of damages: but Lord Kenyon thought it went to the ground of the Action. (*k*)

That learned Judge also ruled: that when the Husband and Wife lived in a state of separation, the Action would not lie. (*l*)

He was likewise of opinion, (*m*) that if the Husband neglected his Wife, and lived openly in adultery with another woman; that he could maintain no Action against another for committing adultery with his Wife. But Lord Alvanley held otherwise. (*n*)

(*h*) Bull. N. P. 28.
(*i*) Bull. N. P. 27. Hodges *v.* Windham, Peak. N. P. C. 39.
(*k*) Bull. N. P. 27. Foley *v.* Lord Peterborough, cit. 2 T. Rep. 166.
(*l*) Weedon *v.* Timbrell, 5 T. Rep. 357. Chambers *v.* Caulfield, 6 East, 244.
(*m*) Wyndham *v.* Ld. Wycombe, 4 Esp. N. P. C. 16.
(*n*) Bromley *v.* Wallace, 4 Esp. N. P. C. 237.

But whether these several matters are to be received in Evidence as going to the ground of the Action, or in mitigation of damages, the Defendant should always be prepared to give them in Evidence when warranted by the facts, as they will go in mitigation of damages at all events. They must be proved by witnesses whose knowledge of the parties, and of their conduct and situation, enables them to give Evidence of them at the Trial.

In mitigation of damages, the usual ground taken by the Defendant is the misconduct of the Husband himself.

His conniving at conduct in his Wife unbecoming a married woman: suffering her to accompany the Defendant to improper places: to be in company with him at an unseasonable time: being himself brutal in his habits, and cruel to, or negligent of his Wife, or having turned her out of doors: being instrumental to his own dishonour, as where he shewed her naked in a Bath to the Defendant: (*n*) that she was a woman of loose character, and had been criminal with others. (*o*) So he may prove that she had a bastard before marriage: but he will not be allowed to give in Evidence general reputation of her being a Prostitute, or having been so, as that might have been occasioned by her familiarity with the Defendant himself. (*p*)

These are facts which are only capable of proof

(*n*) Sir R. Worsley and Bisset, 1 Esp. Dig. N. P. 363.
(*o*) Elsam *v*. Faucett, 2 Esp. N. P. C. 562.
(*p*) Bull. N. P. 27.

by witnesses; and these matters will suggest to what inquiry, in preparing Evidence on this subject, attention ought to be directed. Exculpatory Evidence is safe: but where it is attempted to fix misconduct, guilt, criminality, or neglect on the Husband or to the Wife, it must be clearly made out, or it will be dangerous. (*q*)

(*q*) *Vid.* 2 Esp. Dig. N. P. 363.

CHAPTER VII.

OF SETTLING THE EVIDENCE IN THE ACTION OF REPLEVIN.

THIS being an Action of Trespass for taking the Plaintiff's goods and chattels, the General Issue *Non cepit* denies the taking; and if the Defendant does plead so, the Plaintiff is bound to prove the fact of his having done so, and the goods taken, as stated in the Declaration.

This question, however, seldom occurs; the Defendant for the most part by his Plea, Avowry, or Cognizance, admitting and justifying the taking: as *e.g.* avowing the taking for rent due to him by the Plaintiff, or stating by the Plea of Justification that the goods taken were not the Plaintiff's, but the Defendant's own, or the goods of a Stranger, by whose order he took them. These being questions of fact, the property must be proved to belong to whomsoever it is stated to be in the Plea.

If the taking is admitted by the Defendant, which it is if there is no Plea of *Non cepit;* the Plaintiff is not called upon to produce any Evidence to that effect at the Trial; and the course then is, for the

Plaintiff's Counsel to open the Pleadings; and the Defendant's Counsel to begin, and to state and prove his case.

The principal objects of Avowry or Cognizance are, 1. For Rent arrear. 2. For Damage feasant. 3. For Amerciaments in County Leet. 4. For Tolls. 5. For Suits and Services. The Evidence required in each of these shall be distinctly stated. Secondly, the Evidence under Pleas of Justification by the Defendant, which are general, or the Plaintiff's answer to the Avowry or Cognizance which is also called a Plea in bar of his Pleadings; the Evidence as to each will be found hereafter. And, lastly, the proofs by Witnesses.

The Avowry, or Cognizance in every case, admits the taking of the goods in question. The first is, in the Party's own right: the other as Bailiff or Servant: both are for the several causes before mentioned, and upon which the difference of Evidence must be observed.

1. *Of the Evidence under the Avowry for Rent Arrear.*

This is the most important head in Replevin: and these Rules must be observed,—1. Where the Avowry is for Rent arrear, the Defendant must first prove, that the Plaintiff was his Tenant, or, if it is a Cognizance, Tenant to the Party named in the Cognizance:. that he held the Lands or Premises, for the arrear of which the Distress is made, at the Rent stated in the Avowry:

and lastly, the precise rent he was to pay for them; for unless there is a taking at a certain Rent reserved, there can be no Distress made. That must be therefore attended to in preparing the Proofs, as otherwise the taking as a Distress cannot be justified. For, per Abbott, C. J., a Party cannot distrain, unless there has been a fixed Rent agreed on; nor can there be any Distress, unless there is a contract for an actual Demise at a specific sum. When there is none such, the remedy is by an Action for use and occupation. (*a*)

And the Defendant must prove the holding and the Rent reserved, as stated in the Pleading accurately, for any variance is fatal; as where the Avowry was "that the Plaintiff held the Land from him at a Rent of 110*l*. a-year;" and the Evidence at the Trial was, that he held 148 acres at 15*s*. an acre, which amounted to 111*l*. a year: the Variance was held to be fatal. (*b*)

If there is a Lease, Evidence of these facts is completely made out by producing the Lease, and proving the execution of it by the Plaintiff, by the subscribing witness, as it contains the term demised, and the Rent reserved: if, however, the holding is by parol, the Defendant must prove the Tenancy, by shewing payment of Rent, as such, for a quarter, half year, &c. or an actual letting at the Rent stated in the Avowry or Cognizance; which may be done

(*a*) Dunk *v*. Hunter, 5 B. and Ald. 325.

(*b*) Brown *v*. Sayce, 4 Taunt. 320. Cossey *v*. Diggons, 2 Barn. and Ald. 546. S. P.

either by an agreement in writing, though not under Seal, or by a witness who knows the facts.

To guard therefore against any failure in those respects, if the Plaintiff holds as Tenant under a Lease, it is absolutely necessary that it should be consulted carefully in preparing the Evidence, as any variance in the Avowry or Cognizance between the Rent stated to be reserved, and the holding will be fatal. If, therefore, on investigating the Covenants in the Lease, they are found to vary from the Avowry or Cognizance, it should be amended. (c) Thus, *e. g.* if the Avowry stated the Rent to be paid was 30*l.* a-year, and it was 50*l.*, it would be fatal. The same caution is to be used, where the holding is not by Lease; peculiar care is, therefore, necessary in settling the Evidence in this respect. The Judges are liberal in allowing amendments: when therefore, in preparing the Proofs, any variance is found which can be amended, it is unpardonable not to amend it.

2. It often happens, that the reservation of the Rent requires *a demand* to be made of it before there can be a Distress made. Where that is the case, the Defendant must be prepared to prove that demand by a witness.

There are many cases in which the necessity of a previous demand of the Rent in arrear is required to be made by the Lessor, to entitle him to proceed in Ejectment, which will be noticed hereafter; and it

(c) Brown *v.* Sayce, 4 Taunt. 320.

may also be made a question with respect to the legality of a Distress: (*d*) it is therefore prudent, and consistent with due caution, to make a demand of the Rent, in every case in which it is mentioned in the Lease, and to have a witness at the Trial to prove it; at all events it is a proceeding which tells favourably for the Party who makes it.

Wherever there is a *penalty* for non-payment of Rent, as for ploughing of old meadow, *ex. gr.* where the Rent is increased, the Defendant must prove a demand of the Rent and penalty, or he cannot recover the penalty. (*e*)

3. The Defendant is not required to prove, that the *exact amount of the Rent* claimed by his Avowry or Cognizance was due to him, provided there was in fact any Rent in arrear; for if he proves only part of what he states to be due, it is sufficient, as he may avow for half a-year's Rent as unpaid; and though he proves but a quarter due, he shall have a Verdict *pro tanto.* (*f*)

4. Wherever the Plaintiff has paid Rent to the Defendant, the latter, in Replevin, is never called upon to prove his title; for in this Action, receipt of Rent is title to the Premises for the Rent of which

(*d*) *Vid.* Brown *v.* Dunnery, Hob. 208. Maund's case, 7 Co. 28.
(*e*) Howell *v.* Samback, Hob. 133.
(*f*) Forty *v.* Imber, 6 East, 434. Harrison *v.* Barnby, 5 T. Rep. 246.

he has distrained. (*g*) But as a Person may become entitled to a reversion on the death of another who had a right of Distress, and be obliged to distrain before he has received any Rent, for Rent then claimed to be in arrear and due to him, he must in that case regularly deduce his title, and prove the whole of it by regular Evidence, connecting his title with the Lessor then dead who was entitled to the Rent, and after whom he claims title.

5. These are matters of fact, and proveable by writing or *vivâ voce* Evidence. But where the Defendant has made Cognizance as Bailiff to any one, that Person, as Bailiff to whom the Defendant makes Cognizance, cannot be a witness; for the Defendant is but his Servant, and the Rent to be recovered by the Distress is on his account: he, therefore, is interested, and cannot be called. (*h*)

Of the Plaintiff's Evidence on Pleas in bar of the Avowry.

1. If the Plaintiff has never paid Rent to the Defendant, he may deny the tenancy, and plead "*Non tenuit modo et formâ,*" and put the Defendant on proof of his title. In that case, the Issue lies on the Defendant, and he must prove it by witnesses or otherwise.

(*g*) Per Lord Kenyon, Johnson *v.* Mason, 1 Esp. N. P. C. 91. Syllivan *v.* Stradling, 2 Wils. 208.

(*h*) Golding *v.* Nias, 5 Esp. 272.

Although it is a general Rule, that when the Plaintiff has paid Rent to the Defendant, or attorned to him as Tenant, he cannot dispute his Landlord's title: (*h*) yet he is not precluded from shewing his Landlord's title at an end, or not existing, when he made the Distress; as in this case, where the Plaintiff had by writing attorned Tenant to the Defendant, which being proved, was a sufficient case for the Defendant, who had avowed for Rent arrear. But the Plaintiff offered Evidence at the Trial, of a feoffment to himself, by a Person under whom the Defendant claimed title, and which was rejected at the Trial. The Court held that it should have been admitted. (*i*)

2. He may also deny that any Rent was in arrear, by proving payment, either by a receipt or otherwise, of all Rent due, up to the last day of payment preceding the Distress made. This is under the Plea of *riens in arrere,* which, if pleaded alone, admits the holding, as stated in the Avowry. (*k*)

3. The Plaintiff may plead in bar to the Avowry for Rent arrear *Non tenuit modo et formâ, &c.* That does not bind the Defendant to prove, that the Plaintiff held of him during *all the time* for which he states the Rent to be in arrear, and that he owes for Rent the *precise sum* stated in the Avowry; for he shall account for as much as is really due. (*l*) As where

(*h*) Parry *v.* House, Holt N. P. C. 489.

(*i*) Gravenor *v.* Woodhouse, 1 Bingh. 38.

(*k*) Hill *v.* Wright, 2 Esp. N. P. C. 669.

(*l*) *Ante*, 296.

the case was, that the Defendant avowed for two years and a quarter's Rent from 25th December 1803, and Defendant pleaded *Non tenuit modo et formâ*, the Defendant's proof went to two years only. It was held that for so much he was entitled to recover. (*l*) In settling the Evidence on this Issue, it is therefore necessary only to prove, as much as the Defendant is actually entitled to, though he claims more by his Avowry or Cognizance.

4. He may plead and prove a tender of the Rent due. This to be good must have been made before the Distress was taken. If it was not accepted, and the Distress made afterwards, the taking was unlawful: if the tender was after the Distress made, but before the impounding, the detainer is unlawful. (*m*) This is proved as *ante*, page 177.

The Plaintiff may plead and give in Evidence *payment of ground-rent* to the Defendant's Lessor, for the Lands or Premises which he holds. In that case, he must prove that the Person to whom he paid the Rent was the Defendant's Lessor, and of the Premises which he holds; that the Defendant not having paid the head Landlord, he demanded the rent of the Plaintiff, and that he paid him under threat of a Distress; these facts can be proved by the head Landlord himself, or by his Agent. (*n*)

So if the Lessor granted an annuity charged on

(*l*) Forty *v.* Imber, 6 East. 434.

(*m*) 2 Inst. 107. Six Carpenters' Case, 8 Co. 146. Anscomb *v.* Shore, 1 Campb. 285.

(*n*) Sapsford *v.* Fletcher, 4 T. Rep. 511.

the Land, the Plaintiff may shew that he paid the amount of the Rent to his Grantee, who had threatened to distrain. (*o*)

2. *Of the Evidence under the Avowry for Damage feasant.*

The Defendant in this case may avow,—1. Where cattle are found trespassing on his own land; or, 2. On a common to which he has a right. In the first case, the question generally turns upon the fences being out of repair, through which the cattle passed, and on whom the liability to repair them lies; for if a man's Cattle strays into his neighbour's ground who is liable to repair the fences, he cannot lawfully impound them; and if he does, the owner may replevy them. As to liability to repair the fences, he who has the back of the ditch is bound to keep them in repair. On whose land therefore the back of the ditch is, is a question of proof at the Trial.

On the first point, that is, for a taking on the Defendant's own land: the Defendant is required to prove, that he was in possession of the land where the Distress was made, and that the Cattle were there depasturing when taken; (*p*) for if they escape out of Defendant's ground, he cannot follow them: that they belonged to the Plaintiff: and, lastly, the extent of the injury done to him, all of which is proved by witnesses.

(*o*) Taylor *v.* Zamira, 6 Taunt. 524.
(*p*) Clement *v.* Milner, 3 Esp. N. P. C. 95. Co. Litt. 161 a.

But to make it a good answer to an avowry for taking Cattle, Damage-feasant, "that they came on the Defendant's Land through defect of his fences," the Plaintiff must be prepared to prove, that the Cattle were lawfully in the place from whence they strayed into the Defendant's Land, and that should be so pleaded. As if Cattle are driving along the high road, and they get into the Defendant's ground, his Fences being defective, they are not liable to be impounded being lawfully on the King's highway, driving from one place to another: but if the owner had put them to depasture on the green sward on the side of the road, or left them to feed in the highway, and they went on the Defendant's Land, his Fences being out of repair; that circumstance would not be a sufficient excuse for the Plaintiff, but would justify the Defendant in taking them Damage-feasant, for they were Trespassers on the highway, and unlawfully there; and the defect of the Defendant's Fences is in such case no excuse for the trespass on him. (*r*) The Plaintiff should therefore be prepared at the Trial to shew, from whence the Cattle came on the Defendant's land, where he relies on Defendant's Fences being out of repair, and be prepared to shew that they were lawfully in the place from whence they strayed, and were not trespassing in the close or place from whence they came.

Questions on a taking under a claim of right of Common require more proof.

(*r*) Dovaston *v.* Payne, 2 H. Black. 527.

The Evidence required in those cases is, in the first place, that the Defendant was himself entitled to Common: that is proved by shewing that the place where the Cattle were found was the waste of the Manor; that the Defendant was in possession of land, part of the Manor; and that the Owners or Occupiers of his land have been always used to turn in on it.

This Evidence is sufficient, where the Cattle taken are those of a *Stranger*. But a Commoner may also take the Cattle of another *Commoner*, but which he can do lawfully only, where such latter Commoner has Common for a limited number only: (*s*) in that case, the Defendant must shew the immemorial usage of the Common; that such Commoner whose Cattle were taken was only so entitled to a given number, and that more of his Cattle being found turned in than he was entitled to under the usage, the overnumber only were distrained.

The right of Common being claimed by prescription, which is always stated in the Avowry, precise Evidence of it is essential to the Defendant's case. That prescriptive right is shewn, by calling old witnesses who remember the Common being used by the Defendant or former Owners or Occupiers of the Defendant's Estate, by turning in their Cattle, as far back as they can remember. Uninterrupted usage establishes this right, which is proved, as is just stated. There may be also matters of Evidence to

(*s*) Dixon *v.* James, Lutw. 393. Hall *v.* Harding, 4 Burr. 2426.

this effect, found in the books of the Steward of the Manor.

It must be particularly attended to and observed, in settling the Evidence in this case, that it corresponds precisely with the prescriptive right as laid in the Pleadings; for any variation in a material part will be fatal.

As if the prescription stated by Defendant, was for *all* Commonable Cattle, and it was proved to be for Sheep and Horses only, the Defendant would fail. (*t*)

But in one case it is stated to have been decided, that although the Evidence must strictly correspond with the prescription laid, as to *form*, proof of a right is not required to *the extent laid* in the pleadings: but the Party is entitled to the extent of what he proves, that is, if he claims a right of common, he must prove that he had a right such as he states, though more limited; as he may claim a right in respect of a messuage and one hundred and fifty acres of land, if he proves right in respect of one hundred and fifty acres of land only, he shall be entitled to a Verdict *pro tanto. Ideo quære.* (*u*)

3. *Of the Evidence in cases of Avowries for Fines and Amercements in Courts Leet or Baron.*

When the Defendant avows the taking goods, &c. for

(*t*) Bull. N. P. 59.

(*u*) Ricketts *v.* Salwey, 1 Chitt. Rep. 104.

an amercement or fine in a Court Leet or Baron; as these belong to the lord's manor, the avowant must give the following proofs, either by written Evidence, such as the Rolls of the manor, or by the *vivâ voce* testimony of witnesses acquainted with the custom, which must be proved to have been in use. 1. That the place where the offence was committed was within the manor or jurisdiction of the Court. (*x*) 2. That the offence was cognizable there. S. C. 3. That the goods distrained were the property of the Person who made default, and was amerced or fined. (*y*) 4. That the manor was in the hands of the Defendant who makes the avowry, or, where cognizance is made, of his principal. (*z*)

4. *Of the Evidence in Cases of Avowry, when the Distress is for Tolls.*

1. If the Toll is claimed for passing a public *Highway*, that is *Toll thorough*; in that case, (*a*) the Defendant must give Evidence of the payment of it from time immemorial, by the testimony of ancient Persons who remember it, and can speak to its having always been paid by Persons using the Highway: but that alone is not sufficient. (*b*) He must shew, that he has done some public duty or service, such as repairing part of it, and prove it by Evidence

(*x*) Wormleighton *v.* Burton, Cro. El. 448.
(*y*) Pill *v.* Towers, Cro. El. 791.
(*z*) Brown *v.* Goldsmith, Hob. 108.
(*a*) 1 Esp. Dig. N. P. 382. Trueman *v.* Walgham, 2 Wils. 296. itzh. 26. pl. 3.
(*b*) Trueman *v.* Walgham, 2 Wils. 296.

at the Trial; that is, there must be some consideration shewn for claiming what would otherwise be an exaction on the Subject. And the Plaintiff must prove his prescription precisely in the terms in which it is laid.

If *Toll traverse* is claimed, that is, for going over the Defendant's Land, he must shew, that the Soil over which the way went was his, and then shew immemorial usage of the payment of the Toll, and that the Plaintiff was going over the way, when the Toll was demanded. (*z*)

In both these cases of Toll, the *declarations of persons deceased* and who were acquainted with the place, as to the payment of Tolls, is good Evidence, (*a*) and may be proved by living witnesses who heard such Persons speak of the matter.

So if the right to Toll has ever been questioned and tried in an Action, though between other parties, *the Verdict* is good Evidence. (*b*) That is given in Evidence by producing an Office copy of the Judgment, by which it will appear, that the very matter in dispute has been decided by a Verdict, (*c*) and the right thereby ascertained.

2. If the Toll is claimed as due for *Fairs or Mar-*

(*z*) Fitzh. Ab. pl. 3.
(*a*) Phill. on Evid. 236.
(*b*) City of London *v.* Clarke, Carth. 181. Bull. N. P. 233.
(*c*) Reed *v.* Jackson, 1 East. 357.

kets, as on the Sale of corn, *e. g.* sold there, it may be claimed either by Grant from the Crown, or by Prescription, which supposes a previous Grant: but no prescription is good for Toll on corn or goods sold by sample *out* of Market. (*d*) For Toll can be claimed only for corn *brought into the Market to be* sold; therefore a prescription to claim Toll of corn brought into a Market town for sale, *any part* of which was pitched within the Market for sale, and which should be there sold, was adjudged to be bad. (*e*)

That rule will regulate the extent of the Plaintiff's claim; and in settling the Evidence he should shew how much corn was brought into the Market and sold. It will also direct the Defendant's defence, by shewing that the Toll was claimed for corn sold out of Market: or he may claim an exemption from Toll by Custom, as a Freeman of London. *e. g.* (*f*)

If Toll is claimed by *Grant,* the Grant from the Crown must be produced and proved under the Great Seal: (*g*) but it must be a special Grant of the Toll by name, for a Grant of a Fair or Market *cum omnibus pertinentiis* will not pass a right of Toll. (*h*) The Grant should therefore be carefully examined, to see that when it is given in Evidence at the Trial, it will be found to contain a grant of the Toll itself in express

(*d*) Hill *v.* Smith, 4 Taunt. 520.

(*e*) Wells *v.* Miles, 4 Barn. and Ald. 559.

(*f*) Corporation of London *v.* King's Lynn, 1 H. Black. 206.

(*g*) Blakey *v.* Dinsdale, Cowp. 661.

(*h*) Holloway *v.* Smith, 2 Stra. 1171. Heddy *v.* Wheelhouse, Cro. El. 558, 591.

words; if it does, that is sufficient to shew the right of the Defendant; and then the Defendant must prove that the Plaintiff was using the Fair or Market when it was claimed, that is, that he was exposing to sale some commodity usually sold there.

Toll of this description, claimed by *prescription*, must be proved to have been paid from time immemorial, as before-mentioned as to other Tolls, and by the same mode of proof. (*h*) That is, the Evidence of old Persons, who can speak to its having been paid.

If the Toll is claimed as due for landing Goods at *Ports or Quays*, the Evidence is precisely similar as to title and proof to that in the case just mentioned of Tolls on Highways. (*i*) But the proof must correspond with the title to it as laid in the pleadings. But with respect to this Evidence the Plaintiff need not prove himself owner of the soil: but he must prove some consideration for claiming Toll for landing goods at the Port or Quay; such as cleaning the river, or keeping the wharf in repair. (*k*) This is matter of parol Evidence: but if it is claimed by the owner of the soil, as *e. g.* by the lord of the manor, by prescription, proving that he is so, and that goods have been landed on part of his manor, will entitle him to take Toll; (*l*) for no consideration is then neces-

(*h*) Blakey *v.* Dinsdale, Cowp. 661.

(*i*) 1 Esp. Dig. N. P. 384.

(*k*) Heshord *v.* Wills, 1 Sid. 454. Vinkeston *v.* Ebden, Salk. 248.

(*l*) Colton *v.* Smith, Cowp. 47.

sary to be shewn, the ownership of the soil being sufficient to entitle him to the benefit of his prescription.

5. *Of Evidence in cases of Avowry for suits and services of a Manor.*

If the Avowry is for an *Heriot*, the Defendant must shew by the custom of the Manor that he is entitled to it: this is done by the Court Rolls or entries in the Steward's books, and shewing the usage of paying it.

2. *Of the Evidence of Justification for the Defendant.*

The Defendant in Replevin may plead property in these cases. 1. In himself. (*m*) 2. In a stranger. (*n*) 3. In himself and another person; or if there are two Plaintiffs property in one of them only. (*o*) All these are to be proved by witnesses who know the facts as stated in the Plea, and can prove them at the Trial accordingly, as they are mere matters of fact.

3. *Of the proof by Witnesses in Replevin.*

The particular cases, where the facts are to be proved by witnesses, have been noticed under the different heads.

1. But in general, where a Defendant avows or makes cognizance under a Deed or Lease, he must call the *subscribing witness* to prove it.

(*m*) Wildman *v.* Norton, 1 Vent. 249.
(*n*) Carth. 243.
(*o*) 1 Inst. 145.

2. The *Sureties in the Replevin Bond* cannot be received as witnesses, for they are interested in the event: but if it should happen that one of the Sureties in the Replevin Bond is a material witness, the Court will allow another Surety to be substituted in his room, due notice being given to the Attorney of the opposite Party. This should therefore be observed in settling the Evidence, if there is such necessity for the Surety's Evidence. (*p*)

3. The Principal under whom the Defendant makes cognizance cannot be called as a witness, though no Party on the record; for he is in fact the real Defendant, (*q*) as before mentioned.

(*p*) Bailey v. Bailey, 1 Bingh. 92.
(*q*) Golding v. Nias, 5 Esp. N. P. C. 272.

CHAPTER VIII.

OF SETTLING THE EVIDENCE IN THE ACTION OF TRESPASS.

1. *OF the Evidence for the Plaintiff.*

The Action of Trespass, properly so called, lies either for an entry on the Lands or Premises of another, and for some injury done there, called *Trespass quare clausum fregit;* or for taking his Goods, called *Trespass de bonis asportatis.* These points of preliminary Evidence are in all cases to be observed. (*a*)

1. That in Trespass in either case, the Plaintiff must give Evidence of his being in possession. As if it is for breaking and entering his Close; that he was in possession of it when the Trespass was committed; (*b*) if for taking his Goods, the same Evidence of his being possessed of them should be given. These are matters of fact, and must be proved by a witness. (*c*)

(*a*) Wilson *v.* Mackreth, 3 Burr. 1824. Catteris *v.* Cowper, 4 Taunt. 547. 1 Esp. Dig. N. P. 414.

(*b*) Ward *v.* Macauley, 4 T. Rep. 489.

(*c*) Paine *v.* Whittaker, Ryan and M. 99.

But a Parson who has been inducted only, it has been held, may maintain Trespass for an injury done to his glebe land, though he has not taken possession of it; therefore, by proving his induction, he establishes his right to bring the Action. (*d*)

2. That in Trespass for an injury done to the *Land*, the Plaintiff is not called upon to prove any title to it, in an Action against a wrong-doer, but may rely on his possession only: but if it is Trespass for taking his Goods, the Plaintiff must prove a property in them. (*e*)

But this property need not be the actual property in the Goods; a special property is sufficient. As the Sheriff may maintain Trespass for taking away Goods which he had taken in execution: so may a Carrier for Goods delivered to him to be carried. (*f*)

3. The Plaintiff, if the Trespass is *quare clausum fregit*, must prove the Trespass committed in the Close laid in the Declaration; and where he sets out the abuttals of the Close, in which he complains of the Trespass having been committed, (*g*) he must prove them accurately as laid; that is, he must prove, that what he describes as the abuttal to the East, is to the East; for should it turn out to be to the North, or any other point, he would be nonsuited. And in a

(*d*) Bulwer *v.* Bulwer, 2 B. and A. 470.
(*e*) Graham *v.* Peat, 1 East. 244.
(*f*) Tyrrell *v.* Bash, Cro. Eliz. 639.
(*g*) Bull. N. P. 86.

late case, (*h*) where the Plaintiff described the land, as abutting to the East to land of A. B.; in fact, A. B. was not the Owner of that piece of land, but another Person: the Plaintiff was nonsuited. This is matter of parol proof by witnesses who know the Close in question, and the bounds and situation of it.

It is sufficient for the Plaintiff, *where he names the Close,* to prove the Trespass in the Close mentioned in the Declaration, and this is so, even though the Defendant has a Close of the same name, and has pleaded *liberum tenementum,* and the Plaintiff has not new assigned: but if he had not named the Close, it had been otherwise. (*i*)

In settling the Evidence in this Action, therefore, where the Close is named in the Declaration, it is only necessary to apply the Evidence, to prove the Trespass in that Close only.

4. If the Trespass is for breaking and entering his Close, "*situate and being in the Parish of,*" the Plaintiff must prove the Parish laid in the Declaration to be that in which the lands lie. Where this question as to the proper Parish is raised, it is generally proved by witneses, who have either perambulated the Parish, or by Persons who have served Parish Offices, or collected the Taxes, or who otherwise are acquainted with its boundaries.

5. If the Declaration states the Trespasses as committed "at different days and times between the day

(*h*) Ironmonger *v.* ———, Surry Lent Ass. 1818. MSS.
(*i*) Cocker *v.* Crompton, 1 Barn. and C. 489.

of —— in the year &c., and the time of commencing the Suit;" if the Plaintiff goes for damages for the time laid, he must shew for how many days or months the Defendant continued the Trespass.

And *per* Holt, C. J. at Hertford.(*k*) Where a Trespass is laid with a *continuando*, the Plaintiff ought to confine himself in Evidence to the time laid in the Declaration: but he may waive the *continuando*, and give in Evidence a trespass commited on any day before the Action brought, or he may give in Evidence, only part of the time laid in the *continuando*. In settling the Evidence it is quite sufficient to give Evidence of any Trespass committed before Action brought, to entitle him to a Verdict to the extent he proves.

6. In the case of a *New Assignment*, if it is of a different place from that laid in the Declaration, the Plaintiff must confine his Evidence to the place laid in the New Assignment. (*l*) In settling Evidence, therefore, on an Issue so joined, it will be unnecessary to bring any Evidence as to any trespass committed in the first laid place.

7. In Trespass *de bonis asportatis*, (*m*) the Plaintiff's Evidence is confined to those Goods only mentioned in the Declaration. If he, therefore, *ex. gr.* complained of the taking of his Oxen and Sheep, he could not give Evidence of taking his Horses.

8. If the Action of Trespass *is joint* against seve-

(*k*) 4 Ann. Bull. N. P. 86.
(*l*) Freeston *v.* Crouch, Cro. Eliz. 492.
(*m*) Bull. N. P. 84.

ral Defendants, the Plaintiff cannot have a joint verdict against all, unless he proves the Trespass done *when all of them were present, that is, at the same time.* (*n*) He should, therefore, endeavour to get Evidence of such joint act; for though he may have a verdict against one only, if he proves a Trespass committed by him; if there is a verdict for any of the joint Defendants, he must pay his Costs.

9. The conclusion of the Declaration in Trespass being, "And other wrongs to the said Plaintiff then and there did," (*o*) it might seem that these general words would admit of the Plaintiff's giving Evidence of any wrong connected with the Trespass: but it is not so; it is confined *to cases only of aggravation;* matters which would not of themselves bear an Action, or which could not with decency be put on the Record. (*p*)

As in Trespass for breaking and entering the Plaintiff's house, and taking his Goods, it has been already observed, that he cannot give Evidence of taking any Goods not specifically laid in the Declaration: but he can give in Evidence, that the Defendant, while there, behaved with great indelicacy or rudeness to the Plaintiff's family. This may direct the settling of the Evidence in these points, and prevent the loading of the case with what is unnecessary or inadmissible.

(*n*) Sedley *v.* Sutherland, 3 Esp. N. P. C. 202.

(*o*) 1 Esp. Dig. N. P. 427.

(*p*) Sippora *v.* Basset, Sid. 225. Lowden *v.* Goodrick, Peake N. P. C. 46.

I shall now consider the Evidence applicable to the different heads of this Action, and how the Evidence applying to each is to be settled.

The Pleas are only, Not Guilty, and a Justification.

1. *Of settling the Evidence in Actions of Trespass arising from cases of Tenancy.*

1. The most usual Actions of this description are cases of illegal, or irregular Distresses. The distress is illegal, where the Defendant had no right at all to distrain. 1. As where there was no agreement between the Plaintiff and the Defendant, for the tenancy of the lands or premises at any specific rent reserved. (*q*) 2. Where the Defendant has taken the Goods of a stranger within thirty days, after their removal from the Premises of his immediate tenant. (*r*) Or, 3. Where he has taken things privileged by law from being taken as a Distress. In the case of an irregular distress, the right of the Defendant to make a distress is not questioned: the ground of Action is the irregularity respecting it.

Under this head, as the Plaintiff, whose goods have been distrained, need only prove the taking of the Goods stated in the Declaration, by calling a witness to prove the fact, and the value of the things taken: the Evidence lies on the Defendant to prove a Justification: that is, his right to make the distress.

(*q*) *Ante*, 296. Dunk *v.* Hunter, 5 Barn. and Ald. 326.
(*r*) *Post*, 321. Thornton *v.* Adams, 5 M. and S. 38.

Where the Tenant however brings his Action for an irregular distress, there is no justification ever put on the Record to that effect, the Stat. 11 Geo. II. c. 19. s. 21. (*s*) allowing the Defendant to plead the General Issue not Guilty, and to give in Evidence the special matter of Justification ; that is, the taking of the Goods as a Distress for Rent. That is done, by shewing generally, that the Plaintiff was Defendant's Tenant at a certain Rent: and that it being unpaid, he, or a Person authorized by him, entered and seized the Goods : that he gave the notice of Distress required by the Statute; and had the Goods regularly appraised and sold, as the case may be, pursuing the directions of the Statute more particularly stated hereafter.

This right of the Defendant to avail himself of the defence of a taking as a Distress, by giving it in Evidence under the general Issue, is confined to cases where the distress has been made on the Premises demised, and does not extend to cases where the Tenant has clandestinely carried off his effects which have been taken by the Landlord within thirty days under the Stat. 11 Geo. II. c. 9. If trespass is brought under such circumstances, the Defendant must justify specially, and his proofs correspond with it. (*t*)

The facts of the taking are usually proved by the Broker by whom the Distress was made, if he has not

(*s*) Vaughan *v.* Davis, 1 Esp. N. P. C. 257.
(*t*) Furneaux *v.* Fotherby, 4 Camph. 136.

been made a Defendant; if he has, the Plaintiff must call some other witness. He must produce and shew a copy of the notice of Distress; and prove it to have been served on the Plaintiff, or left at his house, and signed by the Defendant, whose hand should be proved: this specifies the taking, and cause of taking, and that if the Goods were not replevied within five days, they would be sold, concluding with an Inventory of the things taken; the Plaintiff should have notice to produce the original left with him; the Defendant should next be prepared to shew the regularity of his Proceedings as directed by Stat. (*a*) *viz.* that the Goods taken were appraised at the end of the five days, by two sworn Appraisers, sworn before the Sheriff or Constable; that the Goods were sold for the best price which could be got after such appraisement made; and if there was an overplus, that it was left with the Sheriff or Constable. These facts may all be proved by the Broker who made the Distress and conducted the sale, or by his Assistant.

But the Plaintiff may go into his case at once; and after producing the notice of Distress, and proving the Defendant's hand, or the Broker who made the Distress for him, to it, he may then shew, by a witness, the irregularity of the Proceedings; as, for example, that they were sold before the end of the five days, or that the Appraisers were not sworn.

Where the taking as a Distress has been regular in point of form, but the Defendant has made an ex-

(*a*) Stat. 2 W. and M. Sess. 1. ch. 5.

cessive Distress, the Action is Trespass on the case, and not *vi et armis*. The Declaration avers a sum certain as due for Rent: but it has been held, that the Plaintiff is not bound to prove the precise sum stated in the Declaration as due by him, even in an Action for an excessive Distress. But Evidence must be given of what was actually due. (*x*)

But if the Plaintiff lays the situation of the Premises, for the Rent of which he distrains, to be in one Parish, and they are proved to be in another, the Plaintiff will be nonsuited. In settling the Proofs therefore, in such Actions, the Plaintiff must be prepared to shew, that the Premises are situated in the Parish laid in the Declaration. If they have been laid in the wrong Parish, the Defendant should be prepared with Evidence to shew the Parish in which they are situated. This is usually done by the Collectors of the Taxes or Parish Officers: but may be done by any one acquainted with the boundaries of the Parish, (*y*) as *ante*, pag. 314.

3. Where Goods have been clandestinely removed to avoid a Distress, and the Landlord seizes them within the thirty days, Actions of Trespass are often the consequence. In this case, the Landlord (who is the Defendant) must plead the matter specially; (*z*) and he is bound to prove, after the Plaintiff has given Evidence of the taking of the Goods, that the Plaintiff was his Tenant, holding at a certain

(*x*) Sells *v.* Hoare, 1 Bingh. 401.
(*y*) Harris *v.* Cooke, 2 Moore, 587.
(*z*) *Ante*, 318.

Rent, and for which the Distress was made, (*a*) as if there was no such reservation of Rent or Demise, the Plaintiff, on proving it so, would entitle himself to the Verdict: that the Goods in question which had been on the Premises were the Plaintiff's; and would, had they remained there, have been liable to have been distrained: which fact must be clearly proved; for if it was an Undertenant or a Stranger who had clandestinely removed his furniture, to avoid their being taken as a Distress by the head Landlord, as he could not under the Statute, take the Goods of such Undertenant or Stranger, he would be a Trespasser by so doing. If therefore the Plaintiff, whose Goods were so followed and taken, was an Undertenant or a Stranger, on proving that fact, he would be clearly entitled to a Verdict. (*b*) That they were clandestinely carried off the Premises; proof that the removal took place at night, or very early in the morning, is the best. The presumption is then raised, on which the Jury are to decide, whether they were fraudulently taken away to avoid the Distress or not; and as the Statute gives the Landlord a right to follow the Goods for thirty days only, he should be prepared with proof of the actual day on which he seized them, to shew that thirty days had not elapsed. He should also be well prepared with proof by witnesses, as to the time and manner of the removal, to shew that it was suspicious; for if the removal was *bonâ fide*, or with Defendant's knowledge, the Action would not lie; for the Landlord could only take them

(*a*) *Ante*, 318.
(*b*) Thornton *v.* Adams, 5 Maule and Selw. 38.

after removal, when that was fraudulently or clandestinely done to avoid the Distress.

4. If the Tenant brings an Action of Trespass for taking his Goods, which are by law considered as exempt from Distress under particular circumstances, such as Implements of Trade: Wearing Apparel: Beasts of the Plough: or the like; the Defendant, the Landlord, must be prepared with Evidence to shew, that *there was nothing else* on which he could make a sufficient Distress, and that will justify the taking: (*c*) but the distraining of things fixed to the freehold, or Goods delivered to be worked on in Trade, cannot be justified. (*d*)

The Evidence now stated, applies to cases, in which the Plaintiff complains of the taking as such, to recover the value of the Goods only. But he may also lay *special Damage;* such as that by being deprived of his furniture, he was obliged to hire other Apartments at a great expense: so if he or any of his Family caught any illness from the same cause: these may be laid in the Declaration, and Evidence of them given at the Trial: but, in settling the Evidence, attention is only to be paid, to what is specifically stated as special Damage in the Declaration; for under the general allegation of "other wrongs did," it has been already stated, that such Evidence is inadmissible. But though not stated in the Declaration, the Plaintiff may shew, that the Distress was made with great cruelty

(*c*) Gorton *v.* Falkner, 4 T. Rep. 565.
(*d*) Simson *v.* Harcourt, cit. 4 T. Rep. 568.

and violence; and the Plaintiff and his Family insulted or abused, as matters of aggravation.

2. *Of Actions of Trespass for injuries to a right of Fishery.*

Where any Person is entitled to a free, or several Fishery, he may maintain this Action for entering it and taking his Fish. (*d*) The Plaintiff's title in both cases is claimed by Grant from the Crown, or by Prescription, which presupposes a Grant. If the Plaintiff is in possession of the Grant, he must produce it; if not, he must call ancient witnesses to prove that his Predecessors in the Estate always had and enjoyed the right as claimed, from whence a Grant will be presumed.

In settling this Evidence, it must be observed, that where the Plaintiff claims a free or several Fishery, he is put to strict proof of his Title, the claim being derogatory to the common right of the subject. (*e*)

For this reason, it is good Evidence for the Defendant, where the Action is brought for a Disturbance of a Fishery, to shew and rely on, that the water where he fished was an Arm of the Sea, or a nagivable River as high as the water ebbs and flows; for such waters belong to the King, and are open to all his subjects: but if the King has made a Grant of a *free Fishery* to any one, such Grantee has an exclusive right, and may maintain the Action for encroaching on it. (*f*)

(*d*) 1 Esp. Dig. N. P. 402, Smith *v.* Kemp, Salk. 637.
(*e*) Warren *v.* Matthews, Salk. 357.
(*f*) Case of Fishery of the River Bann, Davis. Rep. 149.

If the Plaintiff claims a *several Fishery* which is granted to him also by the Crown, he must be the owner of the soil adjoining to the River. The Defendant may therefore give Evidence, and shew that he had sold the land, as that destroys his right. (*g*)

But as a several Fishery does not exclude the right of another, but a co-extensive right only, the Defendant may shew a Title to fishing in it himself. (*h*)

3. *Of settling the Evidence in Actions of Trespass arising from the pursuit of Game, or of Animals, feræ naturæ.*

Actions of Trespass, arising from the pursuit of, or for breach of the Statutes made for the protection of, Game, (*i*) are either Actions by the owner of the soil, or by Persons who have had their Goods taken under a Search Warrant, or Warrant of Conviction for killing it.

If an Action is brought by the Owner or Tenant of the soil, against a Person, for riding or going over it, or digging and breaking it, it is sufficient to give Evidence of the fact only, and the extent of the mischief. But the Defendant may justify the doing so, 1. By giving in Evidence that he was in pursuit of ravenous beasts, as Foxes, Badgers, &c.: (*k*) but that will not justify him in breaking the ground, or doing un-

(*g*) Carter *v.* Murcot, 4 Burr. 2162.

(*h*) Seymour *v.* Lord Courtenay, 5 Burr. 2814.

(*i*) 1 Esp. Dig. N. P. 403.

(*k*) Geush *v.* Mynns, Cro. Jac. 321.

necessary injury to the fences or ground, (*l*) or in following animals not of that description; neither will it justify him for going on the Land of another, merely for the pleasure of the chase. (*m*) This justification, therefore, may be answered by Evidence on the part of the Plaintiff, who may shew what Game the Defendant was in pursuit of, and that it was not of beasts of that description above mentioned, that is, noxious ones, such as Foxes, Badgers, and Otters, but of other objects of the chace, as *e. g.* Hares. But if the Badger or Otter take earth, the Party pursuing it is not justified in breaking the ground to dig him out, without the leave of the Proprietor of the soil. Where, therefore, this has been done by the Defendant, he cannot justify it: but the Plaintiff must give Evidence of what was done, and the extent of the injury which he sustained, by turning up his soil; of course of the breaking of the ground, which must be proved by witnesses who saw the Game pursued, or the digging of the earth; which must also be proved to be the Plaintiff's soil, and then in his possession.

But it is no justification to a Party coming on the ground of another, that he is Lord of the Manor, or qualified to kill Game; that only exempts him from the penalties under the Game laws.

The owner of the soil may have this Action for *coming on his Land and killing his Rabbits, or other animals, feræ naturæ,* for he has a property in those

(*l*) Gaundry *v.* Felsham, 1 T. Rep. 334.
(*m*) Earl of Essex *v.* Capel, Hertford, Sum. Ass. 1809.

Animals found and killed on his Land, and therefore may maintain Trespass for taking them; as if an Hare is started and killed in any Person's Land, the Hare belongs to him: but if it was started in another Person's Land and hunted into and killed in his, it is the Hunter's. In the first case, the Ownership of the soil, and the place of killing the Animal, must be given in Evidence; in the latter, if killed on any Person's Land, it must be shewn where it was started. (*n*)

2. If an Action is brought for entering the Plaintiff's house to search for snares or engines for destroying Game, and, for taking the Plaintiff's guns or nets,(*o*) the Defendant can only justify this proceeding, under the Warrant of a Justice of Peace, granted to him for that purpose, under Stat. 22 and 23 Car. 2. c. 26. (*p*) To make that a good justification, the Defendant must produce in Evidence the Proceedings before the Justice; that is, prove the Information, and the Justice's hand and Seal to the Warrant; and if any guns, nets, or snares, were seized; that they were found in the Plaintiff's possession.

If a Party is sued and justifies as a Gamekeeper to the Lord of a Manor, he must produce and prove his Deputation from the Lord, and prove that he was sporting within his own Manor.

(*n*) Sutton *v.* Moody, Salk. 556. Churchward *v.* Studdy, 14 East. 249.

(*o*) 1 Esp. Dig. N. P. 403.

(*p*) Carpenter *v.* Adams, Comb. 183.

4. Of settling the Evidence in Actions for Injuries to Fairs and Markets.

The remedy for non-payment of Tolls, and the Evidence respecting it, has been already treated of; (*q*) and will be further noticed in the Chap. of Trespass on the Case, *post.* But though all Persons have a common right to come into a Fair or Market to buy or sell, they are not allowed to break up the soil, or to place stalls or booths on it, without the consent of the Owner of the soil. The sum to be paid for which, is called Stallage or Picage. If such Action of Trespass is brought, the Plaintiff must prove, that he is Owner of the soil on which the Fair or Market is held: that the Defendant broke up the soil to fix a Booth or Stall, and used it for such purpose. (*r*)

5. Of settling the Evidence in Trespass against Justices of Peace, Constables, or other Officers.

The Evidence necessary to be given in Actions against Magistrates, Constables, and other Officers, has been already fully treated of, in the Action of Assault and False Imprisonment; (s) and what is there laid down, is in every respect applicable to the case of Trespass for taking the Plaintiff's Goods. There must be a demand of the perusal and copy of the Justice's Warrant. The Justice must be joined in the Action when the Constable was acting under his Warrant. The Justice must have a month's notice of the Action to be brought, and

(*q*) *Ante*, 306.
(*r*) Mayor of Northampton *v.* Ward, 1 Wils. 107.
(*s*) *Ante*, from page 261.

there is the same limitation as to bringing the Action. It is sufficient, therefore, to refer to those former Chapters in settling the Evidence in Trespass, the rules as to the Evidence being precisely the same. (*t*)

In all cases, however, in which a Constable or Officer acting under a Justice's Warrant, as *e. g.* to levy on a Party's Goods under a Conviction, or search for Snares, &c. under the Statute 22 and 23 Car. 2. c. 26. that is, in all cases of *misdemeanor*, the Constable or Officer must previously demand to be admitted into the House where they are; for if he breaks the outer door, without such previous demand, he will be a Trespasser. If, therefore, an Action is brought against him for a Trespass in breaking and entering the Plaintiff's house and taking his Goods, he should be prepared with Evidence to shew, that before he broke the door, he demanded admittance. This may be done by a witness who was present, and heard the demand made. (*u*)

6. *Of settling the Evidence in Trespass against the Sheriff or his Officers.*

Under this head it must be attended to in settling the Evidence:—1. That in all cases of Trespass *de bonis asportatis*, for taking the Plaintiff's Goods under an Execution, when the Action is against the Sheriff, as the immediate wrong is not done by him

(*t*) Jones *v.* Vaughan, 5 East. 445.
(*u*) Launock *v.* Brown, 2 Barn. and Ald. 592.

but by his Officer, the Evidence must be brought home to the Sheriff through the medium *of the Warrant in that Action directed to the Sheriff's Officer;* which only connects the Sheriff with the act of his Officer. Nor will it be sufficient to shew, even by the Evidence of the under-Sheriff, that the Person who seized the Goods was in fact an Officer, and the Warrant directed to him: (*x*) but the privity between the Bailiff and the Sheriff must be established by the best Evidence, in the particular case, by proving the original Warrant of execution from the Sheriff to that Officer, or at least by proving notice to produce it, so that in case of its not being produced, secondary Evidence of its contents may be let in. This piece of Evidence, in settling the proofs, must be considered as indispensable. 2. That if the Plaintiff in Trespass, was the Defendant in the original Action whose Goods were seized, it is sufficient for the Sheriff to shew the writ on which his Warrant was directed to the Officer, and the Warrant: but if the Action is by a Stranger, whose Goods have been taken, the Sheriff must shew in addition, an Office copy of the *Judgment* in the Cause, and the Warrant issued on the *Fi. fa.* under which he levied. (*y*)

The Evidence as to proceeding against the Sheriff has been already treated of in the Action of False Imprisonment. (*z*)

The law is the same in that Action as in this, the only difference being, that that Action, is for an injurious

(*x*) Drake *v.* Sykes, 7 T. Rep. 113.
(*y*) Martyn *v.* Podger, 5 Burr. 2631.
(*z*) *Ante*, 268, 9.

arrest of the *Person;* this for an injurious taking of the *Goods* of the Plaintiff. The Rules there laid down as to the Pleadings and Evidence, such as giving the Writ in Evidence, &c. in settling the Evidence for this Action, must be referred to, and precisely followed as they are there set down.

In addition to the cases of Trespass against the Sheriff for taking Goods not belonging to the Defendant, may be added that, of his taking what cannot legally be seised under a *Fi. fa.* This applies chiefly to his taking things fixed to the freehold. On these many questions have arisen, which it is not the object of this Treatise to consider, being pure matters of Law.

With respect to the settling of Evidence in Actions against *Sheriff's Officers.* They may be subjected to this Action for misconduct in executing the Writ, but which is a good *primâ facie* justification for the Officer: the Plaintiff may however rebut the defence which the Defendant sets up under it, by shewing, 1. That he *broke open the Plaintiff's house,* to levy the execution, which is illegal: (*a*) but as this is only unlawful, where he enters to take the Plaintiff's Goods, it will be good Evidence in reply, to shew that the *Fi. fa.* was to levy on the Goods of another Person, which had been brought there to prevent the execution, and that *he had previously demanded admittance.* (*b*) These are facts to be proved by witnesses. 2. The Plaintiff may shew, that after having taken the Goods in execution, he kept possession of them on the Premises for an unreasonable

(*a*) Semayne's Case, 5 Co. 91. (*b*) *Ibid.*

time, and did not remove them to a place of safe custody in proper time. (*b*) 3. That he executed a Writ from an inferior Court on the Plaintiff's Goods, for a Cause of Action not within the jurisdiction of that Court. As the Officer must produce his Writ, it then lies on the Plaintiff to shew the want of jurisdiction in the Court. 4thly, and, lastly, he may shew that the Judgment on which the *Fi. fa.* issued had been set aside by the Court. This is done by production of the Rule of Court making the Rule absolute for setting aside the Judgment, which, as it was obtained by himself, he of course is in possession of. These several grounds of Trespass also subject the Sheriff, who may be sued either alone or with the Officer to an Action: but for his own misconduct the Officer is liable over to the Sheriff.

But in this Action of Trespass *Vi et armis*, the questions which frequently occur are as to the *property of Goods taken in execution*: in these Actions the Sheriff is only a nominal Defendant. It is sufficient here to observe, that the only point to be attended to is, in whom is the *actual property* in the Goods. Apparent property, or acts of Ownership, exercised over Goods by the Defendant, will not entitle the Sheriff to take them in execution, and sell them: (*c*) but that proof of property lies on the Plaintiff. But vid. *post*, Chap. of Trover in cases of Bankruptcy. (*d*)

(*b*) Reed *v.* Harrison. 2 Black. Rep. 1218.
(*c*) Dawson *v.* Wood, 3 Taunt. 256.
(*d*) 1 Esp. Dig. N. P. 406.

5. *Of the Evidence in Actions of Trespass against Officers of the Excise or Customs.* (*d*)

1. The Plaintiff should prove the notice of Action. (*e*)

2. As the Action must be brought against these Officers for any thing done in the execution of their duty within three months; (*f*) the Plaintiff's Attorney should always have the Writ in Court, and be prepared with proof of the time of the actual service of it, to shew that three months have not run since the seizure. (*g*) And the time begins to run, from the first act done which turns out to be a Trespass; therefore where an Officer boarded a Ship on the 23d of August, and put three men on board her, but did not actually seize her till the 25th, it was held that the three months began from the 23d, and the months are *lunar months.* (*h*) This will afford a necessary direction in settling the Evidence, as to the ascertaining, whether the Action has been commenced in time or not.

3. The venue must be laid in the County where the offence was committed. (*i*) In making up the Evidence, therefore, it is necessary to ascertain with precision, the place where the Officer seized the Goods, and to see that it is in the County laid in the Declaration.

(*d*) 1 Esp. Dig. N. P. 408.
(*e*) *Vide ante*, 251, 252.
(*f*) Stat. 28 Geo. 3. ch. 37. s. 23.
(*g*) Godin *v.* Ferris, 2 H. Black. 14.
(*h*) Crook *v.* McTavish, 1 Bing. 167.
(*i*) Stat. 28 Geo. 3. c. 37. s. 23.

4. The necessity of collecting the Revenue, making it necessary that Officers should have the power of entering Houses and seizing Goods, which are presumed to be contraband; if an Action is brought against an Officer of the Excise for any thing done in the course of his duty, such as the seizing of the Plaintiff's Goods, the Evidence in the beginning, is to prove by witnesses, the fact of taking the Goods; and the Defendant is then called upon to justify the seizure. The time, place, and manner of seizure, must be attended to, and the Plaintiff must be prepared to rebut the Evidence which the Defendant may bring forward, which may be as follows:—

1. The Defendant may shew, that he entered under a Writ of Assistance out of the Court of Exchequer, which must be produced and proved: he must then prove that he entered the House in the day time, and was accompanied in the search and seizure by the Constable of the place where the Plaintiff's House was situated, and where he seized the Goods in question, as *e. g.* smuggled, or not having been duly entered.

This Evidence would be conclusive; the Officer appearing to have conformed to the directions of the Acts of Parliament in making the seizure: but the Plaintiff may defeat it, by shewing, that the Officer entered it at night, and attended by a Person who was not a Constable; (*k*) or if he was attended by a Constable, that he was not the Constable

(*k*) Bruce *v.* Rawlins, 3 Wils. 61.

of the place where the seizure was made. (*l*) If no Goods are found, the shewing that fact in Evidence, has been held of itself sufficient to entitle the Plaintiff to recover in Trespass for the breaking and entering his House: (*m*) but that has been overruled, where the Defendant has entered under a Warrant granted by two Commissioners. (*n*) The Officer should, therefore, on those occasions, give in Evidence the Warrant, and prove the Commissioner's Seal and handwriting to it.

2. If the entering and seizure is made at night, the Officer must also be accompanied by the Constable or Officer of the place, or he will be a Trespasser. He must, therefore, prove that fact. (*o*)

3. If the *Goods taken have been condemned in the Exchequer,* the Officer should give in Evidence an examined copy of the Judgment of Condemnation there, and that is conclusive Evidence for him. (*p*) The copy must be proved by a witness who compared it with the original.

But a condemnation of the Goods by an inferior jurisdiction, as by the Officers of the Excise or Customs, is not sufficient. (*q*)

(*l*) Redshaw *v.* Brook, 2 Wils. 405. Hill *v.* Barnes, 2 Black. Rep. 1135.

(*m*) Bostock *v.* Saunders, 3 Wils. 434.

(*n*) Sutton *v.* Johnston, 1 T. Rep. 535.

(*o*) Stat. 8 Anne, c. 9. s. 10; 10 Anne, c. 19. s. 12.

(*p*) Scott *v.* Shearman, 2 Black. Rep. 977.

(*q*) Henshaw *v.* Pleasance, 2 Black. Rep. 1174.

That an acquittal in the Exchequer on an Information for smuggling, is conclusive Evidence of the illegality of the seizure, is not quite clear. (*r*) But under such circumstances, in an Action against the Officer, it is certainly advisable, to produce it, which may be had in the same way as stated before, as to the copy of the Judgment of Condemnation.

4. If the Officer seize any Goods liable to Duty, which in fact are not forfeitable, he may shew that they were on board a Boat and no Officer with them, or coming by the waterside, (*s*) on circumstances of credible information. This is matter of *vivâ voce* proof by witnesses who saw the seizure made.

5. And if an Officer justifies a search under a Justice's Warrant, (*t*) though it recites an Information made before the Justice, the Warrant is sufficient Evidence without producing the Information, which Warrant he must regularly prove.

For Evidence under a Justification by an Officer, and in Actions against Justices of Peace and Constables, *vide ante*, False Imprisonment, and 1 Esp. Dig. N. P. 422.

Not Guilty is the General Issue; and *Special Pleas* in this Action are,

1. *A Release.* This is a good Plea in this Action; (*u*) and if there are more Defendants than one, a Release

(*r*) Lockyer *v.* Offley, 5 T. Rep. 255.
(*s*) Stat. 6 Geo. I. c. 21.
(*t*) Cook *v.* Priddle, MS. 1 Esp. Dig. N. P. 428.
(*u*) Cocke *v.* Jennor, Hob. 66.

to one shall be good as to all. The Evidence of this is by Deed, and the execution must be proved by the subscribing witness.

2. *Leave and Licence* is another good Plea in Trespass. This may be a Licence in fact or in Law. That the Plaintiff did give this Licence is matter of proof by a witness who heard it given, or by a writing. It is to be taken to justify every thing which is necessary to do that, for which it was required, and not confined to the very terms of it. Therefore, a Licence to a man to enter and to do something, which must be done by others on his account, justifies their entering to do it. (*u*)

But the Defendant's Evidence of a Licence in fact must correspond with the Licence given, or the Trespass will not be justified by it; and that should be well attended to in settling the Evidence. As where a Person gave leave to another to shew his house for the purpose of getting a Tenant; and the key being mislaid, he entered for that purpose *by the window*: this was held not to be justified by the Licence, and the Plaintiff recovered. (*x*)

A Licence in law, is that right which a man has, to enter the House, or go on the Lands of another for some legal purpose; as *e. g.* to serve Process, or to demand Rent: to see if waste was committed: to go into a Tavern for refreshment at seasonable times, all these

(*u*) Dennett *v.* Grover, Willes, 195.
(*x*) Ancaster *v.* Milling, 2 D. and R. 714.

are matters of fact to be proved by Evidence applicable to the respective Pleas.

3. A recovery in another Action for the same Trespass is also a good bar. (*y*) To support that Plea, the Defendant must give in Evidence, by an examined copy, the Judgment obtained in the former Suit, and prove that the cause of Action was the same. (*z*)

4. By Stat. 21 Jac. I. c. 16. *Disclaimer and tender of amends* before Action brought, is a good Plea. To support such Plea, the Defendant must bring Evidence to prove, that he committed the Trespass by mistake, and, of course, that it was involuntary: he must also prove the Tender of the precise sum pleaded, in the usual way, and then call witnesses to prove, that the sum he tendered was a full compensation for the injury which he had done: but to this Plea the Plaintiff may reply, and prove, the suing out of a Latitat or other Writ, which Writ was sued out before the Tender was made. (*a*)

5. Every Matter which amounts to a justification, by reason of some collateral right such as if derived from Custom, must be specially pleaded and proved as laid. As in Trespass *quare clausum fregit*, the Defendant may justify under a Custom, for the Inhabitants of the Village to play Cricket in the close in question. That must be proved by witnesses, who knew the place, and can speak to uninterrupted usage. They are

(*y*) Morton's Case, Cro. Eliz. 30.
(*z*) Outram *v.* Morewood, 3 East. 346.
(*a*) Watts *v.* Baker, Cro. Car. 264.

usually aged Persons, who have known it for a length of time: but Evidence of a Custom for twenty years, uncontradicted, has been held sufficient Evidence for the Jury to presume the Custom to be immemorial. (*b*)

6. The General Issue in this Action is *Not Guilty;* and under it the Defendant may give *Title* in Evidence; (*c*) that is, he may shew, that the land or the right of possession is his, and not the Plaintiff's: as if a Tenant for life died, who had let the land to the Plaintiff, and his successor had let it to Defendant, who entered on it, for which Trespass is brought, (*d*) he may shew his right to the possession under the Plea of the General Issue. So he may shew, that he held under a good lease which is unexpired; in which case he must produce and prove the Lease by the subscribing witness.

So, in Trespass for breaking and entering the Plaintiff's House or Land, and excluding him from the possession. The Defendant may rely on the fact of the Plaintiff having held the House or Land as his Tenant, and that he had given him *a regular notice to quit,* which not having done, he had entered at the expiration of the notice, and taken possession in his absence. For this purpose the Defendant must prove, that the Plaintiff was his Tenant: that his holding was such as could be put an end to by regular notice, as if he was Tenant, *e. g.* from year to

(*b*) Rex *v.* Jolliffe, 2 Barnw. and C. 54.
(*c*) Dodd *v.* Kyffin, 7 T. Rep. 354.
(*d*) Argent *v.* Durrant, 8 T. Rep. 403.

year: the service of a notice to quit which must be produced and proved, and also that it was regular, that is, ending with the year: and that the Plaintiff continued in possession after the notice had expired. (*e*)

But the Defendant cannot, under that Issue, give in Evidence matters of excuse: as accident, inevitable necessity, negligence of the Plaintiff himself, or the like. (*f*) Evidence of such matters should, therefore, make no part of his Proofs.

In Trespass *quare clausum fregit,* the *Parish* where the Close is stated to be, is material. In settling the Evidence therefore, for the Plaintiff, it is necessary to see, that the Parish is rightly laid; and if there is any doubt of the boundaries, to get witnesses, who know them, to give Evidence of them; for, if laid wrong, the Defendant, under the general Issue, may by like Evidence shew, that the Close lies in a different Parish from that stated in the Declaration, and nonsuit the Plaintiff. (*g*)

In this Action, the boundaries of property separated by a Ditch often comes in question. In that case, the rule of law, as laid down by Lawrence, J. in the case of Vowles *v.* Miller, 3 Taunt. 137. is, that the edge of the Ditch is the boundary of his

(*e*) Turner *v.* Meymott, 1 Bingh. 158.

(*f*) 1 Esp. Dig. N. P. 429. Knapp *v.* Salsbury, 2 Camp. 500. Millman *v.* Dolwell, 2 Camp. 378.

(*g*) Taylor *v.* Hooman, 1 Moore, 161.

land who owns the back of it. This is, of course, proveable by witnesses who know the place in question.

In Trespass *de bonis asportatis,* as the Plaintiff is confined in his Evidence to the particular Goods mentioned in the Declaration: (*h*) In settling the Evidence, therefore, for the Plaintiff, these only are to be attended to.

Of Trespass for the mesne Profits.

This Action cannot be supported, until the Plaintiff has obtained a Judgment in Ejectment. The first step, therefore, in settling the Evidence is to prove the *Judgment in Ejectment by an examined Copy.*

The next step is to prove *the Writ of possession executed,* in case the Defendant has not let the Plaintiff into possession. This piece of Evidence is indispensable, when the Judgment has been by default against the casual Ejector. But where it is after a Trial, it is not usually required, though it may be prudent to have it.

The Plaintiff should also have ready, if called for, *the Rule to confess Lease, Entry, and Ouster.*

The Action is for the Damages which the Plaintiff has sustained, by being kept out of possession, that is, the yearly value of the Land, which he must give

(*h*) Bull. N. P. 84.

in Evidence. As for the length of time for which he is entitled to recover, he can in no case recover beyond the extent of six years: if he goes only for Damages from the day of the Demise laid in the Declaration in Ejectment, the Judgment in Ejectment is conclusive as to his right from that time; and then proof of the yearly value contains the whole of the Damages he is entitled to recover.

But he may go for a time preceding the day laid in the Ejectment: but in that case he must go into Evidence of his Title from that period, as he would be bound to do in trying his Title by Ejectment.

By Stat. 1 Geo. 4. c. 87. The Jury who try the Ejectment between Landlord and Tenant, may find the value of the mesne profits, from the day the Tenant's interest was expired down to the time of the Verdict. In settling, therefore, the Evidence in the Ejectment itself, Evidence should be added of the value of the Land or Premises, to enable the Jury to find a Verdict. But this Statute does not prevent the Lessor from bringing an Action of Trespass for the mesne profits from the day of the Verdict to that of the delivery of possession of the Premises. This, therefore, remains as before stated.

CHAPTER IX.

OF SETTLING THE EVIDENCE IN THE ACTION OF EJECTMENT.

IN settling the Evidence in this Action, particular accuracy is necessary, as the Plaintiff must recover by the strength of his own title.

The necessity there is for comparing the proofs with the Plaintiff's title, as it is to be proved at Nisi Prius, cannot be sufficiently enforced. The formal parts are,—1. To prove that the Lessor of the Plaintiff, or those under whom he claims, have been in possession within twenty years. 2. That the day of the demise in the declaration is laid after his title has accrued. 3. That the Premises are rightly described in the proper Parish, and County. Wherever any error is found in the pleadings, they should be amended. The judges are liberal in allowing amendments in this Action, its object being to try title only; and they have allowed them in all the cases above mentioned. (*a*) I shall therefore consider them more at large.

And, first, it must be taken to be a *general rule, that in every case,* the Plaintiff must be prepared with Evidence to prove, that the Land or Tenements which

(*a*) Doe ex d. Tuckett v. Roe, 2 Barn. and Ald. 773. and *ib. in Not.*

he seeks to recover by Ejectment, have not been held adversely to him for twenty years; or rather he must prove, that he, or those under whom he claims, have been in possession within that period. (*b*) As if the Lessor of the Plaintiff's father, *e. g.* had died in possession and receipt of the rent, and he had been dead less than twenty years, that would be sufficient for the son, the lessor of the Plaintiff. This is enacted by Stat. 21 Jac. 1. c. 16.; and unless he can bring himself within some of the legal exceptions given by that Statute, *as Infancy;* in which case he must prove the time of his birth; that he was *non compos, imprisoned, or beyond sea:* each of which facts must be distinctly proved; for he can go into no case, if the twenty years have run. And in the case of a woman being Lessor of the Plaintiff, she must shew, that she was *Covert* during the twenty years, by proof of an actual marriage as before stated. All this is matter of parol Evidence, as the Plaintiff may shew his possession, either by the actual occupation of the Premises by his Ancestor, under whom he claims, or by himself; or if by a Tenant, by proof of Rent having been paid to him or to his Ancestor. If he is unable to give positive Evidence to that effect, he must abandon his Action.

If a Person has come rightfully into possession of Premises, as *e. g.* if let into possession of Premises as a purchaser, but the title being bad, the purchase could not be completed; no Ejectment can be supported against him unless he has been previously required to give up the possession of them; for his entry being

(*b*) 1 Esp. Dig. N. P. 440.

lawful, he is only a trespasser by withholding the possession. If therefore the person entitled brings an Ejectment to recover the possession, he must in addition to the Evidence of his title, and of his having given the Defendant possession, prove a demand made on the Defendant to deliver up the possession, either by letter or personal demand of it; and he must take care to lay the day of the demise in his Ejectment subsequent to the day of the demand, as on that day his title accrued. If the owner of the Premises brings an Ejectment without having made a demand, the Defendant may shew the terms under which he came into possession; and if there was no demand, the Plaintiff will be nonsuited. (c)

2. The next General Rule to be observed, applies to the day of the demise, and it is to see, that the Plaintiff has laid his demise in the Ejectment after his own title has accrued. For this purpose it should be observed, that the title of an Heir or Devisee accrues on the death of the Ancestor or Devisor, under whom the Lessor of the Plaintiff claims title, as his Heir or under his will. If by an Executor or Administrator, from the death of the Testator or Intestate. If by a Mortgagee, his title accrues on the day after that reserved by the mortgage deed for payment of the money. If by the Lessor who has given a notice to quit, from the day after the notice expired. If by a person in remainder, from the death of the tenant for life; and if for a forfeiture, by reason of a Lease, made having been inconsistent with a power, from the time of the Lease

(c) Right ex d. Lewis v. Beard, 13 East. 210.

made. In settling the Evidence, therefore, these dates must be scrupulously attended to. For this purpose, in every case, the day of the demise laid in the Declaration in Ejectment, must be first and carefully looked to, as well as the time when the Lessor of the Plaintiff's title or right of entry accrued, for the demise must be laid subsequent to it. As, *e. g.* if a Tenant was bound to quit at Michaelmas, and not having done so, his Lessor brings an Ejectment to recover the possession; as the Lessor had no title to the possession till after the 29th of September, he must lay his demise subsequent to that day; that is, as his title commences on the 30th of September, from which time only he has a right to the possession of the lands, the demise is usually laid on that day, or on the 1st of October, to hold from the 30th of September.

By the old practice, the Plaintiff was compelled to prove the Defendant to be in possession of the lands for which the Ejectment was brought: this was productive of many nonsuits, in cases even where the Defendant was indisputably in possession. This was however remedied by a Rule of Court, Mich. Term 1820.; By which it was ordered, " That the Defendant shall specify in the consent Rule for what premises he intends to defend, and shall consent in such Rule to confess upon the Trial, that the Defendant (if he defends as Tenant,) or in case he defends as Landlord, that his Tenant was at the time of the service of the Declaration in the possession of such premises; and that if upon the Trial the Defendant shall not confess such possession, as well as Lease, Entry, and Ouster,

whereby the Plaintiff shall not be able further to prosecute his suit against the Defendant; then no costs shall be allowed for not further prosecuting the same, but the said Defendant shall pay costs to the Plaintiff in that case to be taxed."

In settling the Evidence therefore on this point, the Plaintiff should always have at the Trial the *Consent Rule* to give in Evidence, if necessary; by which means, the title to the Premises mentioned in it, will only come in question.

In many cases an Ejectment cannot be supported without an actual *entry:* it should then be attended to, to see if an entry was necessary in order to give the Plaintiff an opportunity of trying his title, as if it was necessary, and the Plaintiff has not made it, the suit cannot proceed; and where it is required, the fact must be proved at the Trial, and must be given in Evidence, by the Party claiming title. Where a fine of the lands has been levied, it is indispensable. (*d*)

1. The principal cases in Ejectment are,—1. Between Landlord and Tenant.—2. By a Mortgagee.—3. To obtain possession under an Elegit.—4. For Copyhold Premises.—5. By a Devisee.—6. By the Heir at Law.—7. By an Executor or Administrator. These will be distinctly considered.

1. *Of the Evidence in cases between Landlord and Tenant.*

These cases are,—1. Where the Tenant holds over after the expiration of his Term.—2. Where he holds

(*d*) For which see *post* in this Chapter.

over after a notice to quit.—3. Where the Landlord goes for a forfeiture.

1. If the Ejectment is brought by the Landlord, on the ground that the *Tenant held over after the expiration of the Lease* under which he held, the Plaintiff must produce and prove the Lease, and the execution of it by the Tenant; and then the term originally granted will appear by reference to it, and, of course, its expiration by the effluxion of time: by that Evidence, the Plaintiff shews his right to the possession, and which has been wrongfully withheld by the Defendant, and he will recover.

2. If the Ejectment is founded ont he Tenant's holding over after *a notice to quit*: the Plaintiff must prove that the Defendant was his Tenant: that he paid him Rent; and give some Evidence when the Defendant's holding commenced, (*e*) and that it was determined at some time or feast prior to the day of the demise laid in the Declaration. This may be done by giving him notice to produce his receipts; aud proving, either by them or other Evidence, the payment of Rent by Defendant for what became due at some quarter or half year. He must then prove a regular notice to quit, corresponding with the Defendant's holding; that is, if the Defendant's holding ended at Midsummer, the notice must be to quit at Midsummer, (*f*) and so of other days. This often becomes difficult in cases of old tenancies; and as in case the Lessor gives a notice to quit on a

(*e*) Doe ex d. Ash *v.* Calvert, 2 Campb. 387.

(*f*) Right ex d. Flower *v.* Darby, 1 T. Rep. 159.

wrong day, that is, on a day not ending with the Tenant's year, he would be nonsuited, the Court will not allow the Tenant to avail himself of his landlord's mistake, under the following circumstances. As if the Tenant being asked when his Tenancy commenced? answered, at Christmas, *e. g.*, he would not be allowed at Nisi Prius, to shew that it began at another time. (*g*) But an equivocal answer or observation made by the Tenant on being served with the notice to quit at a particular day, as to say "I pay rent enough, or it is hard to use one thus," does not prevent the Tenant from setting up at the Trial, that his tenancy did not commence on the day mentioned in the notice to quit. (*h*)

The Rule has been laid down by Lord Ellenborough, as that of all the Judges. (*i*) That a mere notice to quit at a certain time, is not sufficient Evidence of an holding from that time, if it is doubtful, something must be collected from the personal demeanor of the tenant at the time he receives it. As if at the time he received it, he made no objection, it should go to the Jury to say, whether the Tenant saw or knew the contents, and acquiesced in the statement of the time to quit: but if it appeared, that at the time he did not look at the notice, was illiterate, or it was not read to him, so that he could not know the contents, that rebuts the idea of his acquiescence as to the time of quitting, all this is matter of parol proof. (*k*)

(*g*) Doe ex d. Eyre *v.* Lambley, 2 Esp. N. P. C. 635.
(*h*) Oakapple *v.* Copous, 4 T. Rep. 361.
(*i*) Doe ex d. Clarges *v.* Forster, 13 East. 406.
(*k*) Doe ex d. Ash *v.* Calvert, 2 Campb. 387.

These circumstances must be strictly attended to in settling the proofs as to this part of the case, where the Landlord is not in possession of positive Evidence, as to the time of the commencement of the Tenant's holding; for it is indispensable that he should give some Evidence of an holding from the day to which the Demise in the Declaration refers, such as payment of Rent up to the preceding quarter day. Where he does so, it is a sufficient *primâ facie* case for the Lessor of the Plaintiff to call for an answer: but it does not prevent the Defendant from giving Evidence of the true time of his term commencing. (*l*) He must then prove, that his notice was to quit at the regular time, that is, at the end of the year, and that it was served on the Defendant at least six months previous to the expiration of his holding. (*m*) This notice is proved, by giving the Defendant notice to produce that served on him; and the Plaintiff must, in case the service is not admitted, call the Person as a witness who served the notice, who should produce a copy of that served on the Defendant, which he must swear was a copy, and prove the time of actual service on the Defendant, or the leaving it at his dwelling house, (*n*) so that it may appear to be more than six months previous to the end of the Defendant's holding. But a notice to quit may be given by parol, and proved by a Witness. (*o*)

The Declaration should be carefully looked to, to

(*l*) Doe ex d. Matthewson *v.* Wightman, 4 Esp. N. P. C. 5.

(*m*) Doe ex d. Spicer *v.* Lea, 11 East. 312.

(*n*) Doe ex d. Lord Macartney *v.* Crick, 5 Esp. N. P. C. 196. Roe ex d. Dean and Chapter of Rochester *v.* Pierce, 2 Campb. 96.

(*o*) Jones ex d. Griffiths *v.* Marsh, 4 T. Rep. 464.

see that the day of the demise is a day after the notice to quit expired.

As questions are often raised on the validity of this notice, it must be observed, that it is essential, to prove distinctly at the Trial the following points. (*p*)

1. That the notice contains the Christian and surname of the Defendant to whom as Tenant it is addressed: that it is signed by the Party entitled to the possession: and if there are more than one, by all who are so entitled; (*q*) as in the case of joint Tenants, unless it is signed by an Agent on the part of all, all of whom afterwards must be proved to have recognized his authority: which notice is good. In such case the authority of the Agent must be proved at the Trial: but if signed, by the joint tenants themselves, their hands-writing to it should be proved. (*r*) And if there are several Trustees a notice to quit, given by one, will not be sufficient. (*s*)

But a notice to quit, given by a Receiver of an Estate, under the Court of Chancery, would be good: but he should shew his appointment. (*t*) And the witness, who served the notice, or some other, should be prepared with proof of his signing or handwriting.

(*p*) 1 Esp. Dig. N. P. 467.
(*q*) Right ex d. Fisher *v.* Cuthell, 5 East. 491.
(*r*) Goodtitle *v.* Woodward, 3 B. and A. 689.
(*s*) Right *v.* Cuthell, 5 East. 491.
(*t*) Doe ex d. Marsack *v.* Read, 12 East. 57.

If an Ejectment therefore is founded on a notice to quit; in settling the Evidence, it must be attended to, that it is regular in point of form, and regularly signed.

2. That it was served six months previous to the time required by the Lessor of the Plaintiff for the Defendant to quit, and ended with the year of the Defendant's holding. But if served on the day after any quarter day; as, for example, the 30th of September, to quit on the Lady-day following, that was held in one case at Nisi Prius to be good. (*u*)

If the notice to quit is witnessed by any Person, he must be called; and in that case no parol Evidence will be admitted to shew, that the Tenant read or understood the notice, (*x*) so as to supersede the necessity of calling him.

3, That it expresses the time when the Defendant is to quit; as Michaelmas-day, Lady-day, or the like.

But if the notice is for Michaelmas or Lady-day, it means the 29th of September or 25th of March, New Stile: (*y*) parol Evidence is inadmissible to shew, that where the notice was to quit at Michaelmas, it meant old Michaelmas-day; but where the letting has been by parol, Evidenee is admissible to shew, that if the demise was from Lady-

(*u*) Goodtitle *v.* Musselwhite MS., 1 Esp. *Dig.* N. P. 467. Parker ex dem. Walker *v.* Constable, 3 Wils. 25.

(*x*) Doe ex d. Sykes and Others *v.* Durnford, 2 M. and S. 62.

(*y*) Doe ex d. Spicer *v.* Lea, 11 East. 312.

day, by the *Custom of the Country* old Lady-day was meant; (z) and it must be to quit all the demised Premises, and not any part of them. (*a*)

4. That it was *served* on the Tenant or on his wife on the demised Premises, or at his house, (*b*) which will be sufficient: (*c*) proof of which must be made by the Person who served it; but if there be *Jointenants* of the Premises, service on one of them on the Premises will be sufficient. (*d*)

When there are *under Tenants,* the Landlord is not obliged to serve any notice to quit *on them,* it is sufficient for him, to give his own Tenant notice to quit; and when he obtains Judgment against him, the Sheriff will turn all the under Tenants out of possession. (*e*)

These matters on settling Evidence must be strictly attended to.

3. The third case of Ejectment between Landlord and Tenant, is where it is for a forfeiture, as for *non-payment of Rent, or for other breach of Covenant.* This case can only be, where the Lease gives the Landlord a right of entry for breach of Covenant.

(z) Doe ex d. Hall *v.* Benson, 4 B. and A. 588. Doe ex d. Beddam *v.* Roe, 2 B. and P. 55.

(*a*) Doe ex d. Rodd *v.* Archer, 14 East. 245.

(*b*) Doe ex dem. Morland *v.* Bayliss, 6 T. Rep. 765.

(*c*) Jones ex d. Griffiths *v.* Marsh, 4 T. Rep. 464.

(*d*) Doe ex d. Lord Bradford *v.* Watkins, 7 East. 551.

(*e*) *Per* Mansfield, C. J. Cas. Roe *v.* Wiggs, 2 Bos. and Pull. N. R. 330. Pleasant *v.* Benson, 14 East. 234.

This, for non-payment of Rent, is by Stat. 4 Geo. 2. c. 4. where, by the terms of the Tenant's holding, the Landlord has reserved to himself a right of entry, in case of half a year's Rent being in arrear. For this purpose, the Lessor of the Plaintiff must produce and prove, by the subscribing witness, the lease under which the Defendant held. That, being referred to, the reservation of the Rent, and the right of entry claimed by the Landlord, will appear. The Affidavit of the half year's arrear of Rent, is made before the Ejectment is brought: but proof of it should be had, if required, at the Trial But the Plaintiff is required to give further Evidence; that is, he must either prove by a witness, that he demanded the Rent upon the Land or Premises at a convenient time before sunset of the day the Rent became due, and that it was not paid; or he must prove in the same way, that there was no sufficient distress, as goods or property on the Premises sufficient to answer the Rent in arrear. (*f*) *Tamen quære,* as to this; and *vid.* Roe *v.* Davis, 7 East. 363. It is however advisable to attend to it, and to have such proof.

If *the Ejectment is for non-payment of Rent,* proof of the payment lies on the Defendant; and though the right of entry is in the words of the Lease given for non-payment of Rent, "*being lawfully demanded,*" (*g*) three Judges against one decided, that the Lessor was not called upon to prove a previous actual demand of it before he brought

(*f*) Doe ex d. Foster *v.* Wandlass, 7 T. Rep. 117.

(*g*) Doe ex d. Scholefield *v.* Alexander, 2 Maul. and Sel. 525.

his Ejectment; and where the words of the Lease contained a *proviso,* that if the rent was in arrear for twenty-one days the Lessor might re-enter, "although no legal or formal demand should be made," it was held, that, when the rent was in arrear twenty-days, the Lessor might maintain an Ejectment without making either an entry or demand of the rent. The Evidence of a demand is, therefore, unnecessary in both cases: but where a previous demand is required, that must be proved by a witness who made it or heard it made.

If the Ejectment is brought on *the Covenant for re-entry for breach of any other Covenant* in the Lease, it is first necessary to look to the Lease, and see if there is a Covenant giving a right of entry to the Lessor for the breach of any Covenant in the Lease, and on which the Ejectment is brought. The Lease must be produced at the Trial; and then the Plaintiff must first prove, as before, the execution of the Lease by the subscribing witness; then, by reference to the Lease, the Covenant will appear for the breach of which the Plaintiff brings his Ejectment.

The Plaintiff must then give Evidence of the breach of that Covenant; and then his right of entry will appear by the Lease, and, of course, his right to recover. Thus if the breach of Covenant complained of is, that the Defendant ploughed up old meadow, he must shew that the meadow broke up was ancient meadow, and that the Defendant ploughed it, or broke it up, which he must call witnesses to prove.

In cases of Ejectment, for breach of Covenant, a Judge will make an order for a *Particular of the breaches* the Plaintiff goes for; and, at the Trial, the Plaintiff will not be allowed to go into Evidence of any other. This order should be obtained in every case, as the Defendant will know how to regulate his Evidence, and confine it to such points only as are mentioned in the particular.

These are cases where the relation of Landlord and Tenant is clear, and the Action of Ejectment comes on to Trial, by reason of the Defendant's wróngfully keeping possession after the determination of his Tenancy. But there are cases where the Landlord may maintain an Ejectment without any notice to quit.

1. If the Defendant *disclaims* to hold of the Lessor of the Plaintiff, and sets up a title in himself, or as holding under some other Person: in that case, the Plaintiff goes on with his Ejectment, and no notice to quit is required; (g) but the Lessor of the Plaintiff must go into his title, and prove it regularly; for the Defendant being in possession, the Plaintiff must recover by proving himself entitled.

But as it often happens, that the Defendant has been Tenant to the Person under whom the Lessor of the

(g) Throgmorton *v.* Whelpdale, Bull. N. P. 96. Goodright *v.* Morgan, MS. 1 Esp. Dig. N. P. 471.

Plaintiff claims, or to whom he is Assignee, Heir, Executor, or Administrator; in which case the Tenant would be entitled to notice to quit, and by which the Lessor of the Plaintiff may be taken by surprise at the Trial. He should be therefore prepared to prove the disclaimer in addition to his title. That is done, by giving Evidence of the Defendant having said to this effect, "that the Lessor of the Plaintiff had no title: that the Premises belonged to some one else: that he was not Tenant to the Lessor of the Plaintiff." Evidence to this effect amounts to a disclaimer by the Defendant, that he holds as Tenant to the Plaintiff, and of course is not entitled to a notice to quit.

2. If the Tenant has held under a Lease made by *a Tenant for life*, who is dead, or who *had power to make Leases* which have not been well executed, (*h*) the Person entitled in remainder or reversion may maintain an Ejectment against the Tenant in possession without any previous notice to quit. But in such case he must prove his title to the Premises by regular Evidence; in which case, if the Tenant sets up any Lease, it is answered by shewing, that the Lessor who made that Lease was only Tenant for life, and that he was dead. That he was only Tenant for life will appear from the Title Deeds which the Plaintiff must prove in support of his title: or if he had a power to make Leases, under which the Lease relied on by the Tenant was made, the Plaintiff may shew that he did not pursue the

(*h*) 1 Esp. Dig. 474.

power, and in what respect: and that, for that reason, his Lease was void. He must then give Evidence that he is dead.

This is the case, where he in reversion or remainder has never accepted Rent from the Tenant; for if he has, (*i*) though it does not set up the Lease, it makes the Tenant a yearly Tenant, and as such entitled to a notice to quit; which, in such case, must be proved as before stated, or the Plaintiff cannot recover.

Where the question arises as to a Lease being valid or not when made under a *power*, they are generally mere questions of construction: but parol Evidence is in many cases admissible. If the Tenant for life was bound under the power to make Leases only, on which was reserved the best yearly rent that could be had, and a Lease is made at a certain rent, the Party seeking to break that Lease may call witnesses to prove, that they would have given a higher rent than what was reserved in the Lease. So if the power was to lease "at such rents as were ancient and accustomed, or as great and beneficial rents, duties, and services as had formerly been reserved." Old Leases may be given in Evidence to shew what was reserved in them. (*k*)

3. Where the *Lease has expired by effluxion of time*, and the Tenant continues in possession, no

(*i*) Doe ex d. Martin *v.* Watts, 7 T. Rep. 83.
(*k*) Doe ex d. Lord Jersey *v.* Smith, 2 Br. and B. 473.

notice to quit is required, but the Lessor may immediately proceed by Ejectment: but if he receives Rent for any time after the expiration of the Lease, the Tenant then becomes a yearly Tenant, and entitled to notice to quit. (*k*)

This is the case, where an Ejectment is brought by him in remainder, after the death of the Tenant for life; and it often happens, that it is difficult to ascertain the fact, whether the Tenant for life is dead or not, so as to entitle the remainder-man to enter, as *e. g.* if he was abroad, or if a Lease was on the life of a stranger to the family, about whom nothing is known. In that case the Rule is, that the proof of the fact lies on the Party who asserts the death; for the presumption is, that the Party continues alive till the contrary be proved. (*l*) But after a lapse of seven years, if no account can be given of the Person for that period from the time when he was known to be living, by any of his family or connections, who should be called; the presumption of the duration of his life is then at an end. (*m*) As if the Tenant for life was a sailor, and seven years before had sailed on a voyage, during which period he had never been heard of: he shall be presumed to be dead. (*n*)

In settling Evidence therefore on this head, the

(*k*) Messenger *v.* Armstrong, 1 T. Rep. 54. 162

(*l*) Wilson *v.* Hodges, 2 East. 312.

(*m*) Doe *v.* Deakin, 4 B. and A. 434. Rowe *v.* Hasland, 1 Black. R. 404.

(*n*) Doe ex d. George *v.* Jesson, 6 East. 80, 85.

Plaintiff should prove by witnesses when he was last seen alive; and prove by calling some members of his family, or those who knew him, that he had not been heard of for seven years. And in this case, where a Tenant for life had not been seen or heard of for fourteen years, by a Person resident near the estate, to which had he been living he would have been entitled, though not a member of the family: it was held to be *primâ facie* Evidence of his death. (*o*)

4. Where a Mortgagor has made a *Lease* or *Demise subsequent to the Mortgage,* the Mortgagee may bring an Ejectment without giving any notice, for the demise is absolutely void. (*p*)

5. Where an *entry is given for breach of Covenant,* no notice to quit is required.

In Ejectment between Landlord and Tenant, it may be taken as a general rule, that the Tenant cannot dispute his Landlord's title after he has paid him Rent: but he may shew his Landlord's title expired; as if he was Tenant *pur auter vie,* he may shew that Person dead. (*q*)

Of the Evidence by the Defendant in Ejectment.

It is sufficient for a Defendant to prove a title out of the Lessor of the Plaintiff, though he proves

(*o*) Doe ex d. Loyd *v.* Deakin, 4 B. and A. 433.

(*p*) Keech *v.* Hall, Dougl. 21. Thunder ex d. Weaver *v.* Belcher, 3 East. 449.

(*q*) Gravenor *v.* Woodhouse, 1 Bing. 38.

none in himself; (*r*) for which purpose he may prove, that the Lessor of the Plaintiff had parted with all his interest, having sold it; and that by his own declarations; (*s*) and, first, as between Landlord and Tenant, or other Persons claiming the Land as Owner.

1. *If the Ejectment is by the Lessor founded on a notice to quit*, the Defendant, on proof of the notice to quit being made by the Plaintiff, and it specifying a particular day on which the Defendant was to quit, may give in Evidence, that *his Tenancy commenced not on the day mentioned in the notice, but on another and different day*; and this will nonsuit the Plaintiff. As if the Tenancy commenced on old Lady-day, and the notice "to quit was on *new* Lady-day." (*t*) So if the notice was to quit at Michaelmas, and the Defendant had in fact commenced Tenant at Christmas, the Plaintiff could not recover on such notice. The time of the commencement of the Defendant's Tenancy is matter of Evidence; and is done either by shewing the actual time when the Defendant became Tenant, by a witness; or by some agreement in writing, which mentions the time from whence the Defendant was to become Tenant. As where the Defendant has held over, by shewing his expired Lease or otherwise.

2. He may shew the *true time of serving the no-*

(*r*) 1 Esp. Dig. 462. and Cas. *ibid.* Doe ex d. Crisp *v.* Barber, 2 T. Rep. 749.

(*s*) Doe ex d. Lowden *v.* Watson, 2 Stark. 230.

(*t*) *Vid. ante*, p. 352. and Doe *v.* Benson, there cited.

tice to quit, and that it was *short of six months;* which may be done by calling a Person who saw the Plaintiff's witness, whom he has called to prove service of the notice to quit, actually deliver it to the Defendant, the Tenant, and who can speak accurately to the time, as the notice must be served full six months before it is to expire. Or he may shew that it never came to his hands; as if the Plaintiff's Evidence was of a service of the notice on some Person on the Premises, but who, on being called, proved, that he had never delivered it to the Tenant (*u*): this must be proved by parol.

But where it is said, that a notice to quit is insufficient, if short of six months, that is the case, where the Tenancy *is a yearly one:* for if the taking of the Premises was by the month or week; a month or week's notice would be sufficient. (*x*) So if there is an agreement, that the Tenant shall accept any shorter notice, on proof of the agreement, and the corresponding short notice, that will be sufficient. And where the Tenant agrees to take a shorter notice than six months; still that must end with the year, unless otherwise expressed; with which the notice to quit must correspond. (*y*)

3. He may shew a waiver of it by the Landlord. (*z*)

This means, shewing something done by the Landlord inconsistent with his notice, that is, considering

(*u*) Jones ex d. Griffiths *v.* Marsh, 4 T. Rep. 464.

(*x*) Doe ex. d. Hazell *v.* Parry, 1 Esp. N. P. C. 94.

(*y*) Doe ex d. Pitcher *v.* Donovan, 1 Taunt. 555.

(*z*) 1 Esp. Dig. N. P. 472.

the Defendant as his Tenant, though by his notice the tenancy should have been at an end.

This may be done, either by proving receipt of Rent by the Landlord as Rent, or a Distress made by him for Rent becoming due after the notice to quit expired, (*y*) or by his bringing an Action of Covenant for Rent due after the demise laid in an Ejectment, brought on a Covenant to re-enter for a forfeiture; (*z*) for by receiving the Rent, or making a Distress for Rent so subsequently due, the Landlord admits the Defendant to be his Tenant at that time; who otherwise, by continuing in possession after the notice expired, would have been a Trespasser. And by bringing an Action of Covenant for Rent growing due after the demise in Ejectment, it was an acknowledgment that the Lease then subsisted; and unless it was considered as void, no Ejectment would lie. And the law is the same, if the Ejectment was brought under the statute 4 Geo. 2. c. 28. for non-payment of Rent; acceptance of Rent becoming due after the day of the demise, is a waiver of the Landlord's right to recover. (*a*)

To give the Defendant, however, the effect of these acts as amounting to a waiver: if it is receipt of Rent on which he relies, he must shew that the Plaintiff received the money *as Rent*; (*b*) that will best appear by

(*y*) Goodright *v.* Cordwent, 6 T. R. 219. Zouch *v.* Willingale, 1 H. Black. 311.

(*z*) Roe ex d. Crompton *v.* Minshull, Bull. N. P. 96.

(*a*) *Per* Ashurst, J. Cheney *v.* Batten, Cowp. 247.

(*b*) Doe ex d. Cheney *v.* Batten, Cowp. 243. 1 Esp. Dig. N. P. 472. Pennant's Case, 3 Co. 64.

the receipt, in which it may be expressed that it was paid as Rent, or by a witness who paid, or saw it paid *as such.* If the Landlord had *distrained*; the Defendant should shew the notice of Distress served on him, which specifies for what it was made; or if there was a *Replevin,* he should shew by the Avowry, that the Landlord claimed by it, Rent subsequent to the notice: for which purpose the Proceedings in Replevin or an examined copy must be given in Evidence. If it was on the ground of an *Action of Covenant*; the Declaration in Covenant should be produced, in which the breach assigned will appear: but, in settling the Evidence, it must be attended to, to see that the breach was for a portion of Rent becoming due after the day of the demise laid in the Declaration, which should be referred to.

But where the Ejectment is grounded on a forfeiture; in addition to this Evidence, in order to make any of these acts of the Lessor amount to a waiver of the forfeiture, the Tenant must prove, that *at the time the Landlord received the Rent, distrained, or brought an Action of Covenant, he knew of a forfeiture having been committed*; (*d*) such, as if he lived near the demised Premises, and saw the Defendant commit the breach of Covenant on which he goes; as ploughing up old meadow, *e. g.* and afterwards accepted Rent; that would waive the forfeiture. (*c*) But the Defendant must give these facts in Evidence by a witness; for proof of the mere receipt of Rent, distraining, or bringing an action, would not

(*d*) Doe ex d. Walter *v.* Davids, Cowp. 803.

(*e*) Pennant's case, 3 Co. 64. Doe ex d. Shepherd *v.* Allton, 3 Taunt. 78.

defeat the Landlord's Ejectment, if, when he did any of those acts, he was ignorant of the Tenant's having committed a forfeiture.

But it must be observed, that where the breach of Covenant is a *continuing one,* as *e g*. suffering the Premises to be out of repair; (*f*) the acceptance of Rent, or distraining, is only a waiver of the *then existing* breach of Covenant; and that if the Tenant continues to suffer the Premises to continue unrepaired, an Ejectment may be brought for such continuing breaches: these matters must be, therefore, well attended to in settling the Evidence on them. It is, therefore always prudent, for the Plaintiff to be prepared with proof of an existing breach of Covenant as near to the time of bringing the Ejectment as possible.

Of the Evidence on the part of the Lessor of the Plaintiff, as Assignee of a Bankrupt, Mortgagee, Lord, or Copyholder, under an Elegit, by Devisee, or Heir at Law.

1. If an Ejectment is brought by the *Assignees of a Bankrupt*: (*g*) in addition to the proof of the Commission, and that they are Assignees, by such Evidence as is before stated; (*h*) they must shew, that the *Deed of* Assignment from the Commissioners to them was of the Premises for which the Ejectment is

(*f*) Doe *v.* Bliss, 4 Taunt. 735.
(*g*) 1 Esp. Dig. N. P. 439. Elliott *v.* Danby, 12 Mod. 3.
(*h*) *Ante*, 144—6

brought, and that it *was enrolled.* That will appear by the Deed itself and by the indorsement of the proper Officer on it, and is so proved. (*i*)

This is necessary to complete their title to recover: as the Assignment of the Commissioners, only operates on lands which were the Bankrupt's at the time of the assignment, the Defendant may shew, that the lands for which the Ejectment was brought, came to him afterwards, and so nonsuit the Plaintiff; as, in that case, there should be a new Deed of assignment and enrolment of it. (*k*)

As the Assignees stand in the place of the Bankrupt, and have the benefit of his antecedent proceedings, such as, of an Ejectment brought by him to recover the possession, the Tenant is entitled to set up against them any defence which he might have had against the Bankrupt himself, such as are before mentioned.

2. If the Ejectment is brought by a *Mortgagee.*

This Ejectment can only be maintained against the Mortgagor himself who is in possession of the mortgaged Premises, or against a Tenant, or some other Person who has come into possession of them under him subsequent to the Mortgage; (*l*) for it will not lie against a Tenant, who was so to the Mortgagor by a demise made prior to the mortgage, for the Mortgagee takes such estate only as the Mortgagor had

(*i*) *Per* Buller, J. Dougl. 56.
(*k*) Doe *v.* Mitchell, 2 M. and S. 446.
(*l*) White *v.* Hawkins, Dougl. 23. *Per* Lord Mansfield, *id.* 269.

at the time of making the Mortgage; and as the Mortgagee could not evict him, and he has the legal estate in him, the Mortgagor cannot recover the possession in an Ejectment. (*m*) When, therefore, the Ejectment is against the Mortgagor, the Plaintiff is only called upon to prove the execution of the Mortgage Deed, and the possession of the Mortgagor; then, by reference to the Deed when proved, it will appear that the time for payment of the money is elapsed, and of course the right of entry is complete. If the Person in possession came in subsequent to the Mortgage, the Lessor of the Plaintiff should connect him with the Mortgagor, as by shewing that the Mortgagor let the Lands or Premises to him subsequent to the Mortgage.

If the Defendant was a Tenant to the Mortgagor prior to the Mortgage, as the Mortgagee cannot evict him, and recover the possession by Ejectment, he must shew that he was so, either by proving his Lease, or shewing a demise to him so made and existing; and that will nonsuit the Plaintiff, unless his title was at an end when the Ejectment was brought.

3. If the Plaintiff's Ejectment is to obtain possession of Premises under an *Elegit*, he must give in Evidence an examined copy of the Judgment Roll which he obtained, and under which the Elegit issued, and which contains the award of the Elegit, and the

(*m*) 1 Esp. Dig. N. P. 444. Doe ex d. Da Costa *v.* Wharton, 8 T. Rep. 2. Doe ex d. Eborall *v.* Lowe, 1 H. Black. 447.

Return of the Inquisition: but he need not produce a copy of the Writ of the Inquisition, and the Sheriff's return on it. (*n*) That Roll sets out the Inquisition held by him, and the finding of the Jury of the Premises for which the Ejectment is brought.

This is all that is necessary to prove, where the Defendant against whom the Elegit has issued is in possession, except shewing that in fact he is so: but if the possession is in a third Person, the Plaintiff must shew, that such third Person claims under the Defendant against whom the Elegit goes, by a demise subsequent to the Elegit, or that he the Lessor has a right to the possession; for if a Tenant is in possession under a Lease or demise prior to the Elegit, the Plaintiff cannot recover. (*o*)

As the Return to the Inquisition, contains the finding of the Jury as to the Premises for which the Ejectment is brought, it must be attended to, that the return is accurate in describing and finding the Premises *by metes and bounds*: if it does not, no Ejectment can be supported on it; and the objection may be taken at the Trial, by the Defendant to the Plaintiff's Evidence, as before stated, in which case he cannot recover. (*p*)

4. If the Ejectment is for *Copyhold lands*, it may be by the Lord for a forfeiture, or by the Tenant to

(*n*) Ramsbottom *v.* Buckhurst, 2 M. and S. 565.
(*o*) Doe ex d. Da Costa *v.* Wharton, 8 T. Rep. 2.
(*p*) Tenny ex d. Masters *v.* Durrant, 1 Barnw. and Ald. 40.

recover land so seized by him, by a person claiming as Heir, or as entitled by purchase.

If the Ejectment is by *the Lord for a forfeiture,* he must, 1st, Shew that the Defendant was a Copyholder of the Manor, of which he is the Lord: that will appear by his admission on the Rolls. (*q*)—2dly, He must prove a custom of the Manor, for the Lord to seize for a forfeiture, by reason of the act done by the Tenant; as by cutting Timber, for example; and then shew, that the Tenant committed that act. (*r*) The custom is generally proved by the Steward, or some ancient Persons who have long known the Manor, and who know the custom. The act of the Defendant is matter of parol Evidence. The Lessor of the Plaintiff should also shew, that he was Lord, when the forfeiture took place, and that the act was done within twenty years. (*s*)

If the Lord has seized the Land as forfeited, and the Copyholder who has been evicted, or who claims to be entitled, brings the Ejectment; the Plaintiff in such case must prove, if *he* was evicted, his own admission by the Rolls of the Court: if he claims as Heir, Devisee, or Purchaser, under the Tenant who was last seized of the Copyhold, his title is established by proving the admission of the Person under whom he claims, by the Court Rolls; and then establishing his title, if as Heir at law, by shewing his pedigree: if as Devisee, by proving the Testator's Will; and if by Purchase, by proving the conveyances from

(*q*) Doe ex d. Tarrant *v.* Hillier, 3 T. R. 162.
(*r*) 1 Esp. Dig. N. P. 148.

such Person to him. When that is done, the Defendant is called upon to shew his title, which is under the forfeiture.

But where the Ejectment is so brought for a Copyhold, and the Person who claims title has never been admitted, he must give in Evidence, an application to the Steward of the Court to be admitted, and a refusal on his part: for an actual admission is not necessary; (*s*) such a demand should be made and proved, in the case of every Ejectment brought for Copyhold Premises where there has been no actual admittance, and a demand to be admitted as above stated, it is sufficient, without the Party tendering himself at the Lord's Court, and requiring to be admitted: this Proof must be made by some Witness, who accompanied the Lessor of the Plaintiff for the purpose of demanding admission, or by proving a written answer from the Steward or Lord, to such an application.

In questions of Ejectment on Copyholds, the Court Rolls are usually produced by the Steward, and they are Evidence; and so also are Entries in his Book respecting admissions, receipt of *fines*, &c. connected with the Manor. But if it is necessary to prove any Entry in the Steward's Book, it must be regularly produced: be identified as the Book kept by the Steward of the Manor, and his handwriting to the several Entries be proved: but when the Book was of thirty years of age, it was held sufficient to make it

(*s*) Doe ex dem. Burrell *v.* Bellamy, 2 M. and S. 87.

Evidence, to prove that it came out of the proper custody, without proving the Steward's handwriting subscribed to the Entry. (*t*)

By stat. 55 Geo. 3. c. 192. a Devise of a Copyhold Estate by Will, is enacted, to be effectual and good, without a previous surrender to the use of it; so that the production of the Court Rolls, to shew a previous surrender to the use of the Will, is now no longer necessary, to make part of the Evidence in an Ejectment for Copyhold Premises, claimed under a Will, as was the case before the passing of the Act: proof of the Will is sufficient for that purpose.

5. Lands which may be claimed by Will, are Lands of inheritance or in fee-simple: Copyhold: or Leasehold. The first of these can only be passed by a Devise by Will, which by Stat. 29 Car. 2. c. 3. must be in writing, and signed by the Testator, attested by three Witnesses, and subscribed by them in the Testator's presence.

1. If the Ejectment is brought by the *Devisee* of Lands of inheritance, that is for *an Estate in Fee,* or an Ejectment is brought by the Heir at Law against a Devisee in possession claiming such Estate: the Party who claims title under the Will, is required to give strict proof of the Execution of it, pursuant to the Statute.

For that purpose, if the Devisee is Lessor of the

(*t*) Wynne *v.* Trewhitt, 4 B. and A. 376.

Plaintiff; he must prove the death of the Testator, and that he was in possession of the Estate at the time of his death. He must then produce the original Will of the deceased. If there was no personal Estate given by it, so that it was not necessary to have any Probate of it, the Devisee must produce the will itself; if it was brought into the Commons, by reason of some personal property passing by it, an officer from thence must produce the original Will, and state from whence he brought it.

If the Ejectment is by the Heir at Law, against the Devisee, he is only required to prove by his pedigree that he is Heir at Law; and then the Devisee must give the same Evidence when he is Defendant, as is stated above, as from the will his whole title is derived.

The Execution of it by the Testator, is then required to be clearly proved, (*x*) and that it was according to the Statute of Frauds, with the attestation of the three Witnesses to it; that it was so executed, must be proved by one at least of the Subscribing Witnesses, who must be called.

In settling the Evidence, these points are to be observed, 1st, That it is not necessary, that the three Witnesses should be all present together, when the Testator executed the Will. (*y*) But where they do wit-

(*x*) Bull. N. P. 264. Doe *v.* Smith, 1 Esp. N. P. C. 391.
(*y*) Gryle *v.* Gryle, 2 Atk. 176.

ness the Will at different times, the Testator should do some Act in the presence of each, indicative of his Execution of it; as, by going over his name with a pen, *e. g.*: and it would not be sufficient, where two had regularly attested the Will, to say to a third, "That is my Will," pointing to it, and bidding him attest it. (*z*) 2. Where the Will consists of several sheets of paper, it is not required, that the Witnesses should see or sign each sheet; (*a*) for if the different sheets were found together after the Testator's death, and one is regularly attested, it is sufficient. (*b*) 3. It is not necessary, that the Witnesses should see the Testator actually sign; it is sufficient if he acknowledges to all the Witnesses, that the name subscribed was his handwriting, and that they subscribe their names in his presence. (*c*) 4. The Witnesses must all subscribe their names in the Testator's presence: this does not mean, that he is to be proved to have had his eyes on them, when they wrote their names; it is sufficient, if he is so situated, that he could see them do so, as *e. g.* if they did it in an adjoining room, but the door between the two rooms was open. (*d*) But if the room in which the Will was signed by the Witnesses, was so far from that, in which the Testator was at the time, that he could see them, that would not be suffi-

(*z*) Gryle *v.* Gryle, 2 Atk. 176.

(*a*) *Per* Lord Mansfield, 3 Burr. 1775.

(*b*) Bond *v.* Seawell, 3 Burr. 1773.

(*c*) Smith *v.* Codron, 2 Ves. 455. Stonehouse *v.* Evelyn, 3 P. Wms. 252.

(*d*) Shires *v.* Glasscock, Salk. 688. Casson *v.* Dade, 1 Brown. Rep. 99.

cient. (*e*) And it is not of itself sufficient that the Will should be executed in the same room with the Testator, to make it a sufficient execution of it, as it might be done clandestinely, some Evidence must be given to shew, that the Testator knew of what was doing, as, by requesting the Witnesses to sign it. (*f*) Nor by the sealing of it only. (*g*) 5. By "the Testator signing the Will," it does not necessarily mean, the putting of his name at the end of it. It is sufficient if it begins thus, "I John Stiles." A codicil to a Will, if regularly executed by three Witnesses, "and to be taken as part of the Will," will establish the Will, though the attestation of the Will was insufficient. (*h*) When, therefore, the Proofs are to be prepared, and the facts examined into, as to the Execution of the Will, it will be ascertained by the above Rules, if they are sufficient.

In practice, it is usual, where the Ejectment is not by the Heir at Law, to call one Witness only, to prove the Execution of the will by the Testator, and the attestation of it by the other Witnesses: (*i*) but that can be the case only, when they were all present together. (*k*) If the Witnesses attested the Will at different times, they must be all called to prove the Execution of the Will by the Testator in the pre-

(*e*) Edlestone *v.* Petty, Comb. 156. Broderick *v.* Broderick, 1 P. Wms. 239.

(*f*) Longford *v.* Eyre, 1 P. Wms. 740.

(*g*) Smith *v.* Evans, 1 Wils. 313, 6, 7.

(*h*) Goodtitle ex d. Woodhouse *v.* Meredith, 2 M. and S. 5.

(*i*) Bull. N. P. 264. Doe *v.* Smith, 1 Esp. N. P. C 391.

(*k*) Stonehouse *v.* Evelyn, 3 P. Wms. 252. Smith *v.* Codron, 2 Ves. 455.

sence of each; (*l*) for the Will must be regularly executed in the presence of three Witnesses. So, it is said, that the Heir at Law has a right to have all the Witnesses called. (*m*) If the sanity of the Testator, or the regular Execution of the Will is disputed, it will always be prudent for the Party who claims title under it, to call all the Witnesses to it.

Care must however (in settling the Evidence) be taken, that the Witnesses to the Will are all credible ones: if any of them are incompetent, the Will cannot be supported. Therefore, a Witness who has an interest to establish the Will, as if he was a Legatee under it, would be incompetent. (*n*) But by Stat. 25 Geo. 2. c. 6. the Legacy of such Person is declared void, and he may be a Witness. So if one of the Witnesses had been convicted of Felony, and so is infamous and incompetent, the will would be inoperative.(*o*) The meaning of credible Witness in the Statute means such a Witness as can be examined without objection, to prove the Will: no Devisee, therefore, can support his title under a Will, if so attested.

If any of the Subscribing Witnesses is abroad, it will be sufficient to prove his handwriting; (*p*) and when they are all dead, it will be sufficient to prove

(*l*) *Id.* 439.
(*m*) Bull. N. P. 264.
(*n*) Holdfast ex dem. Anstey *v.* Downing, 2 Stra. 1253.
(*o*) Pendock ex dem. Mackendar *v.* Mackendar, 2 Wils. 18.
(*p*) Croft *v.* Pawlet, 2 Stra. 1109.

the Testator's handwriting: but a Will thirty years old, proves itself, as is the case of a Deed; it therefore need only be produced.

Where a Party claims as Devisee under a Will; there often occurs an ambiguity by the description of him, which becomes a question at *Nisi Prius;* and in such case, the Lessor of the Plaintiff must shew that he is the Person meant in the Will. As if a man had two nephews of the name of John, and he devises the Lands to his Nephew John, without saying which; it is matter of Evidence, to shew, which was meant; as Witnesses could prove that he meant John the son of James, and not the other; *e. g.* as by hearing the Testator say, that he meant to leave his property to him. So if the Devise was to his Niece Jane Simons, and he had no Niece of that name, but had one of the name of Mary Simons, parol Evidence may be given as to his intention in her favour. (*q*)

2. This is the case of a Devise of Estates of Inheritance: (*r*) but if the Property, sought to be recovered, *is Copyhold or Leasehold only,* the Evidence must be settled in a different way; Copyholds by Stat. 55 Geo. III. c. 192. require no surrender, and they and Leaseholds pass by a Will requiring no formal attestation: in such cases the Lessor of the Plaintiff should prove, that the Testator was entitled to them: in the case of a Copyhold, by shewing his admission and enjoyment of it; in the case of Leasehold interest,

(*q*) Doe ex d. Oxendon *v.* Chichester, 4 Dow. 93.
(*r*) 1 Esp. Dig. N. P. 481.

by producing either the Lease under which he held it, or shewing his title to it. The Plaintiff should then produce the Probate of the Will, by which the Testator gave it to him; and then, in the case of Leasehold, prove the assent of the Executor or Administrator to the bequest. (*s*) To prove this last fact the Executor himself, or Administrator, may be a Witness, or some Person who knows of the assent having been given. So, proof of the Executor permitting the Rent to be received by or for the use of the Legatee, will be sufficient proof of it.

3. If the Ejectment is by an *Executor* or *Administrator*, it can be for a term of years only; as to such only they are entitled. Both must prove the description of property which they seek to recover; that it is a Lease or term for years; and that the Testator or Intestate was possessed of it. If the Testator's title was by Lease, it should be produced, and proved by the Subscribing Witness: if the Testator was Tenant of it only from year to year, the Lessor of the Plaintiff may call the Person to whom the Testator or Intestate was Tenant, and prove how he held. In the Declaration in Ejectment, the Lessor of the Plaintiff is not described, either as Executor or Administrator, but by name only; but they must prove their title. They must therefore have at the Trial to give in Evidence; the Executor, the Probate of the Will; the Administrator, the Letters of Administration, under

(*s*) Young *v.* Holmes, 1 Stra. 70. Doe ex d. Lord Say and Sele *v.* Guy, 3 East. 120.

the Seal of the Ecclesiastical Court. If the latter are lost, the original Book of Acts of the Court wherein are the orders for granting Administration, (*t*) and an Exemplification of the Letters of Administration (*u*) will be admissible Evidence. These are had, by subpænaing the Officer of the Court.

Of the Evidence by the Defendant in the case of an Ejectment by a Devisee, or Legatee.

The Defendant whether he defends as Heir at Law, Legatee, or personal Representative, of the Person who died seised or possessed of the property which is the subject of the Ejectment, may rely on many matters of defence, such as,—1. He may prove that the Testator, at the time of making his Will, (*x*) was *not sane.* This is matter of fact to be proved by Witnesses, who knew him. (*y*)

2. That he was an *Infant.* (*z*) If the Ejectment is for Lands or Estates of Inheritance, he must, in that case, prove the Testator to have been under the age of twenty-one years when the Will was made, by Evidence of the time of his birth, as is before mentioned in cases of Infants, as before that time he could make no Will, and so the Devise would be void. But the Lessor of the Plaintiff may prove, that though

(*t*) Elden *v.* Keddell, 8 East. 187.
(*u*) Hardr. 108.
(*x*) 1 Esp. Dig. N. P. 487.
(*y*) Marquis of Winchester's Case, 6 Co. 23.
(*z*) Anon. Salk. 44.

that was so, he had published it after coming of age, (*a*) or that by Custom an Infant may devise. (*b*)

But if the Ejectment is for Copyhold Lands, the Lessor of the Plaintiff may shew; that by Custom, an Infant of a certain age may devise by Will; and if it is for Leasehold, a male may devise such property at the age of 14 years, and a female at 12. (*c*) The age of the Testator being proved as before stated, is therefore Evidence of Title, if the date of the Will is after the Testator or Testatrix had attained those ages.

3. He may prove, that the *Testatrix* was at the time, a *Feme Covert;* for she cannot make a Will, unless a power to do so, has been reserved in her Settlement when married. (*d*) Her marriage must be proved as is before stated; but may be rebutted, by proof of the Settlement before marriage, by which a power was reserved to her to make a Will. This must be done by producing and proving the Deed of Settlement by the attesting Witness.

4. He may shew, that the *Will was obtained by fraud,* circumvention, or by the Party claiming under it, availing himself of the Testator's imbecillity of mind or body. (*e*) This is matter of fact to be proved by

(*a*) Herbert *v.* Torball, 1 Sid. 162. Hawes *v.* Burton, Comb. 84.

(*b*) Bac. Ab. tit. Will, B.

(*c*) God. Orph. Leg. s. 1. ch. 8. 2 Vern. 104—469. Swinb. p. 11. sect. 2.

(*d*) Jenkins *v.* Whitehouse, 1 Burr. 431.

(*e*) Bransby *v.* Claridge, Bull. N. P. 266. Webb *v.* Cleverdon, 2 Atk. 424.

vivâ voce Evidence, of Persons who were with the Testator before or at the time of his death, or knew of his habits before it.

This defence, as well as that of the unsoundness of mind of the Testator when he made his Will; may be made out, in part, by cross examination of the Witnesses to the Will who must be called: but as it is unlikely, that they would admit their own turpitude, so far as to say, that they attested a Will produced under such circumstances, the Defendant must rely on other Evidence. The Servants and Medical Attendants of the deceased, are the usual Witnesses: but the friends and acquaintance of the Testator in his lifetime, can prove their opinion as to the soundness of his mind, as well as his bodily infirmities. The influence obtained over a weak mind, whether by terror or cajoling, if exerted to procure a Will, will destroy its validity; and the exertion of such influence proved by those who had opportunities of observing it. These circumstances must vary in every case; and in settling the Evidence, the most trifling circumstances which go to impeach the Will, should not be passed over.

5. He may prove the *Will* set up by the Devisee to have been *cancelled or revoked;* this is by something done in fact, or by operation of law. This last can only be effectual under the Stat. of Frauds, by shewing another Will or Codicil in writing, or some other writing declaring it to be cancelled or revoked; (*f*) and which must be as duly executed as the

(*f*) 1 Esp. Dig. 490.

original Will was: or by the first Will being torn, burnt, or cancelled by the Testator himself, or by some one in his presence, and by his direction.

When this is to be set up in answer to the Will on which the Devisee relies, the Defendant must produce another Will or Codicil of a later date than that given in Evidence by the Devisee; and he must prove the Execution of it with the same solemnities, as the other was proved with. (*g*) If the Defendant relies on the partial burning or tearing of the first Will; that will appear by the Will itself when produced, but it may be proved on the other side: that it was done by accident, unless it was wholly destroyed, which must be proved; otherwise, either the burning or tearing of it, is good proof of cancelling (*g*)

But there is this difference between the setting up a second Will as a revocation of the first, (*h*) and the tearing or burning of it, in this respect; that though the second Will will operate as a revocation of the first, where both exist together; yet, if the Testator cancelled the second Will, and the first remained undestroyed, the first Will is thereby set up: (*i*) but if the first Will was cancelled, as by tearing off the seal and hand, or burning the copy, it will not be set up by cancelling the second will. These are matters of fact to be proved by Witnesses.

(*g*) Onyons *v.* Tyrer, 1 P. Wms. 343.

(*g*) Bett ex d. Mole *v.* Thomas, 2 Black. Rep. 1043. Doe ex dem. Pearks *v.* Pearks, 3 B. and A. 489.

(*h*) 1 Esp.Dig. N.P. 491. Goodright ex. d. Glazier *v.* Glazier, 4 Burr. 2512.

(*i*) Burtenshaw *v.* Gilbert, Cowp. 49.

It would be inconsistent with the object of this Treatise, to state all the cases respecting the execution, proof, and cancelling of Wills. It is sufficient to refer to the Elementary Books on the subject, such as Selwyn's Law of Nisi Prius, pag. 832., and to 1 Esp. Dig. of Nisi Prius from pag. 481 to 491. But this recommendation should be attended to, in settling the Evidence and preparing the proofs, first to collect from the witnesses, all the facts which took place as to these several matters, and then to see how they apply to the different cases. It will then not be a difficult matter to see, whether they are sufficient to support the case or not.

6. The Defendant may set up, in answer to a Will, (*k*) the *revocation of it by operation of law.* This is,—1. *By Marriage and the birth of a child,* taking place subsequent to the making of the Will. For this purpose the Defendant must prove, the actual marriage of the Testator as before-mentioned (pag. 287.) and the birth of a child or children. But there must be this further circumstance proved, that the child or children were unprovided for; and there must be Evidence *both* of the marriage and of the birth of the child or children. (*l*)

But the Evidence of the presumption of revocation from the birth of a child, may be rebutted; by shewing that the child was provided for, and

(*k*) 1 Esp. Dig. N. P. 492. Christopher *v.* Christopher, quot. Dougl. 35. Lancashire *v.* Lancashire, 5 T. Rep. 49.

(*l*) 7 Vesey Jun. 242. Kenebel *v.* Scrafton, 2 East. 530.

that that which was devised, was not the whole of the Testator's estate. (*m*)

7. By producing and *proving a Fine levied of the lands* in dispute, or a *Recovery suffered or any Deed* of Conveyance or Settlement of them, made *subsequent to the Will*, or what amounts to a change of the Estate as by feoffment, lease and release, bargain and sale, &c. a Fine or Recovery must be proved. *Vid. post.* pag. 389.

8. The Defendant may shew the Will to be inoperative, on the ground, that the *Testator became entitled* to the Estate in question, by descent or purchase, *subsequent to the making of the Will, for such* lands do not pass by it. (*n*) This is done, by shewing the Conveyances or Will under which the Testator took, their dates, and proving the execution of them, will shew the fact, that the Testator became entitled to them after the making of his Will.

Of the Evideuce in Ejectment brought by a person claiming as Heir-at-law.

In this case the Plaintiff must make out his case, by strict Evidence of Pedigree, in an unbroken line of descent. If he claims to be the son of the Person last seised, he must prove not only that he was so, but that he was his legitimate son.

(*m*) Kenebel *v.* Scrafton, 2 East. 530.
(*n*) Archer *v.* Bokenham, 11 Mod. 148.

The best Evidence of this, is proof of the actual marriage of his Father and Mother, by Witnesses, who were present at the time; the copy of the marriage Registry, and actual cohabitation.

This is done by producing an examined copy of the Register from the Church Books, and by the *vivâ voce* testimony of Witnesses who knew the parties. (*o*)

When such full and precise Evidence cannot be had; their cohabitation: the introduction of the Plaintiff's Mother by his Father as his Wife: her reception as such in Society: his declarations that they were married: is all good Evidence, and may be proved by Persons acquainted with the Family.

The Plaintiff should also prove, that his Father either had no other Son, or that he was the eldest if he had: and if he was not the eldest born son, he should prove the death of all those who were born before him, and that they died without Issue. And if the Ejectment is by a woman, who claims as Heir, she should prove, that her Father had no Son; or if he had sons, that they were dead without Issue.

For this purpose, Entries by the parents in the Family Bible of the birth of their children has been held good Evidence. Entries in the Books of the Parish, where the Father and Mother resided, of their baptism, are good Evidence, and are proved by copies examined with the original. They often express the

(*o*) *Vid. ante*, Chap. of Adultery.

time of the birth of the children, and where that is the case ascertain which is the eldest : but as it often happens, that the Father and Mother may have had many children baptized in the same Parish ; and the Plaintiff may appear by the Registry not to be the eldest, though the others are dead ; it will then be necessary for him to prove their deaths ; and if any born before him, appear to have been married, he should prove, either that they had no issue, or that, if they had, that they are dead ; as the children of an elder brother have title before him. For this purpose, examined copies of the Registers of burials are good Evidence.

The connection and relationship of an Individual or of different members of a family, is proved by Persons who knew the Individual, or heard him spoken of as related to the family in some degree : but where Evidence of hearsay is admitted, as to a certain person being a member of a family, it is confined, to what those who are related to the family, or made part of it, have been heard to say ; what strangers or even old servants of the family have been heard to say respecting it, is not admissible Evidence. (*p*)

Therefore the dying declaration of a Person, as to the relationship in which the Lessor of the Plaintiff stood to the Person last seised, was held to be inadmissible in proof of his pedigree, she not being a

(*p*) Johnson *v.* Lawson, 2 Bingh. 86.

relation to the family, but a servant to one of them only. (*q*)

And the declarations of a family, respecting particular members of it, as to their degree of relationship, legitimacy, or the like, are confined to such as were made *before the institution of the Suit* in which such declarations are material: declarations made after it has been commenced, are inadmissible. (*r*)

These facts are, however, capable of proof by Witnesses who knew the Family, who can speak to the relationship, in which the Plaintiff stood, to the Person he claims under, and who may know of the deaths of those, who are before the Plaintiffs in point of title. But, though this Evidence is sufficient, it is always advisable to have the Copies of the Registers, as they are without suspicion.

But there may also be written Evidence to the same effect: as if in any Action, a question had been raised as to a Pedigree, and that not even between Parties, but by strangers to those then litigating; in which *a Special Verdict had been found, stating the Pedigree of the family*: it would be Evidence to prove a descent. (*s*) That Evidence might be given, by producing an examined Copy of the Judgment in the Cause, in which the Pedigree was stated.

A Bill in Equity, filed by an Ancestor of the Party,

(*q*) Doe ex d. Sutton *v.* Ridgway, 4 Barn. and Ald. 53.
(*r*) 1 Phill. on Evid. 231.
(*s*) Bull. N. P. 233.

stating a Pedigree of his family, has been received as Evidence: (z) but it is quite inadmissible, unless the Relationship is established between the Party who filed the Bill, and he who offers it in Evidence; and it is even doubtful, if it is admissible at all. If, however, in settling the Evidence, it should be thought advisable to give it in Evidence, the Bill must be had from the files of the Court, and authenticated as found there. The degree of Relationship is proved as before mentioned.

In Settling Evidence of Pedigree, it must be observed as a Rule; that a Party has not made out his title sufficiently, if *by possibility, there may be existing some lineal or collateral Relation having better title than he has.* It is therefore necessary, wherever an Ejectment is to be tried, in which title is to be made out at the Trial, that a regular Pedigree should be drawn out, beginning from a common Ancestor; what Issue he had should be regularly set down; and the Issue of such Issue, if necessary: this should be done, by the examination of the Parish Registers in which the births and deaths of any of the family are to be found, or by the account given of the family, by some of those connected with it, or who were acquainted with it, or the members of it. Evidence must be prepared as to each of those stated in the Pedigree, and be set down distinctly in the Proofs; as *e. g.* if the Lessor of the Plaintiff claimed as Grand Nephew to the Person who died seised, he must shew, that his father was the Son of such Person's brother; and he must

(z) Taylor *v.* Cole, 7 T. Rep. 3. *in not.*

prove also, not only that he was his Brother, but that he was his elder, or next Brother; or if there were other Brothers elder than him, (as they would be heirs to such Person), he must prove that they died without Issue; and he must then give the same Evidence, that *his* father was the Heir at law to the Brother of the Person who died seised, and that he is Heir to him.

But that there are Relations nearer than the Lessor of the Plaintiff, is not to be *supposed*, without some ground. As if the Lessor of the Plaintiff proves himself to be the son of John and Mary, it is not to be presumed, that they had a Son elder than him: but, if an entry is found and produced on the other side, or parol Evidence given, that they had a Son elder than the Lessor of the Plaintiff; it will be presumed that he is living, unless he shews the contrary; and such Son having better title, the Plaintiff cannot recover.

All these facts of births, deaths, and marriages, which are to be proved by Certificates from the Parish Registers, where the Parties or any members of the family resided; must be produced by a witness who examined them with the original entries, and be sworn to as correct Copies. They should also be signed by the officiating Minister of the Parish, attesting them as Copies from the Parish Registers; and his handwriting to them should be proved.

If a Devisee, or any other Person, gets into possession, and an Ejectment is brought by the Plaintiff claiming as Heir-at-law to him last seised, either against a Person who claims in the same right, or a

Devisee in possession; the Defendant may set up the defence of *Bastardy in the Lessor of the Plaintiff.*

This is a question of fact to be proved by witnesses only. (*a*) If a marriage had in fact taken place between the Plaintiff's mother, and the Person whom he sets up as his father, and which is admitted: in answer to it, the Defendant may prove that the Plaintiff was born before the marriage took place: while the Plaintiff's Father was absent from England: (*b*) or was in a distant part of the kingdom, when the Plaintiff was born, and had been so for more than nine months preceding. (*c*) So, that there was no access, nor could be presumption of any. (*d*)

But the wife is an inadmissible witness to prove non-access of the husband. (*e*)

2. So the Defendant may shew, that though a marriage had taken place, that it was void under the Marriage act, 26 Geo. III. c. 33. (*f*) That the deceased, the Plaintiff's father, was an Infant at the time of the marriage, and that it was celebrated without the consent of his Father; or if he was dead, of the Guardian; or of the Mother if there was no Guardian, if living and unmarried; and if there was no Mother living and unmarried, of a Guardian appointed by the Court

(*a*) 1 Esp. Dig. N. P. 495.
(*b*) Rex *v.* Maidstone, 12 East. 550.
(*c*) Bull. N. P. 112.
(*d*) Rex *v.* Luffe, 8 East. 193.
(*e*) Rex *v.* Reading, Bull. N. P. 112.
(*f*) Rex *v.* Alberton, 1 Ld. Raym. 395. Pendrell *v.* Pendrell, 2 Stra. 925.

of Chancery. *(f)* So by the same statute he may shew that the marriage, though celebrated in a church or chapel, was without publication of Banns or Licence. And this is the Case even of Bastards' Marriages. (*g*)

3. He may prove that the Plaintiff's father was impotent, and so he of course a Bastard. (*h*)

4. He may prove a sentence of Divorce dissolving the marriage; which is done by giving in Evidence a Copy of the *proceedings in the Spiritual Court,* and their Sentence on the marriage, which, while unrepealed, is conclusive. (*i*)

And in all cases in which the Spiritual Courts have cognizance, their Sentence is conclusive: and their Sentence on a question of Marriage, either in affirmance of it, or declaring it a nullity, has been held conclusive Evidence on a question of Legitimacy arising incidentally upon a claim to a real estate. (*j*)

5. He may shew that the Plaintiff was born more than nine months after his father's death, and so was illegitimate. (*k*)

It will, after consideration of these general heads, be proper to consider the Evidence in Ejectment where a *Fine or Recovery* has taken place, as the

(*f*) Rex *v.* Hodnett, 1 T. Rep. 96.
(*g*) Priestley *v.* Hughes, 11 East. 1.
(*h*) Doe ex d. Lomax *v.* Holmden, 2 Str. 940.
(*i*) Carth. 225.
(*j*) 11 State T. 260. Phil. on Evid. 322.
(*k*) Bull. N. P. 114.

operation of them may occur in all the preceding cases. (*l*)

Wherever the Party is proceeding on his title, in the case of an adverse possession; he should first search at the Office; to see whether any Fine has been levied, or Recovery suffered, of the Lands or Premises which he claims; as, if there has, and it is regular, it is a complete bar to all further proceeding. A fine is, however, not conclusive, unless five years have passed, and it was a Fine with Proclamations, by statute 4 Hen. VII. c. 24.

If a *Fine* has been levied of the lands, for which an Ejectment is brought, and the Lessor of the Plaintiff seeks to recover notwithstanding, he should, prior to his bringing the Ejectment, make an actual entry on the lands, or cause one to be made in his name, and claim the possession. Of this entry Evidence must be given at the Trial: and be proved by a witness who saw it made. It must be by the Party claiming title, or by some Person authorised by him, and who heard him claim the estate; and though it is not required to be done, unless there has been a Fine with Proclamations, (*m*) it is always advisable.

The demise in the Declaration in Ejectment must be laid on a day subsequent to the Entry just mentioned. In settling the proofs; the day of the Entry, and of the demise in the Declaration, must therefore be accurately looked to, to see that it is subsequent to the Entry.

(*l*) 1 Esp. Dig. 459. Stat. 4 H. 7. ch. 20.

(*m*) Doe ex d. Duckett *v.* Watts, 9 East. 17.

The Ejectment too must be brought within a year after the Entry: that must also be attended to.

A Fine or Recovery when set up by the Defendant in bar of the Plaintiff's right, if valid, is conclusive, unless the party comes within some of the exceptions, which afford to the Plaintiff the answer to the effect of the Fine or Recovery. These must be attended to. *Vid. post.* pag. 392.

The Evidence necessary in the case of a Fine is given; 1. By the production of the Chirograph of the Fine. This is made out by the Chirographer of the Court of Common Pleas, (*n*) and is Evidence of itself: but if it is a Fine with Proclamations, it is not sufficient proof of the Proclamations, that they are indorsed on the Chirograph; (*o*) they must be proved by a Witness who examined them with the Roll, and be thereby proved to have taken place.—2. In addition to the Fine, it is necessary to have Evidence at the Trial to shew, that the Person, by whom the Fine was levied, was in possession of the land when he did so levy it; (*p*) for otherwise the Fine will be of no avail: but proof of payment of rent to the Cognizor will be sufficient. So there may be other Evidence; such as Evidence of that possession; and proof of actual occupation or enjoyment.

Where the Defendant has set up and proved a Fine levied. If the Lessor of the Plaintiff was under any

(*n*) Gilb. Ev. 24.

(*o*) Bull. N. P. 230. Waldron *v.* Coombe, 3 Taunt. 166.

(*p*) Doe ex d. Osborn *v.* Spencer, 11 East. 495. Doe ex d. Foster *v.* Williams, Cowp. 621.

of the disabilities mentioned in the statute 4 Hen. VII. he must be prepared with Evidence to shew, that when the Fine was levied, he was an Infant: *in prison: non compos:* or *out of the realm*; or if a woman, then *under Coverture.* He must prove these facts by witnesses: if an Infant, he must prove the time of his birth: if in prison, that he was so by the Books of the Prison, or by persons who had seen him there: if *non compos,* by a witness who knows him, and that he had been insane: if out of the realm, by some witness who can speak to the fact: if a woman, her marriage must be proved as before stated, and that her husband was then living. In all these cases, the time when these incapacities were removed, should be accurately proved, and the entry proved within five years after; and it must appear that the Ejectment was brought within the year after.

If a Recovery is set up, it is given in Evidence by production of an examined copy of it.

If the Recovery was suffered by a Tenant in Tail, that is valid and sufficient: but if, at the time of the Recovery suffered, there was a Tenant for life, in which case a surrender of his Estate is necessary to give validity to the Recovery; that surrender, in case of a modern Recovery, must be proved to have taken place. (*q*)

But after twenty years' possession under a Recovery, (*r*) the title of a Purchaser is declared to be valid, on proof of the Deed making a Tenant to the

(*q*) Warren ex d. Webb *v.* Greneville, Stra. 1129. Goodtitle ex d. Bridges *v.* Duke of Chandos, 2 Burr. 1065.

(*r*) *Vid. Plen.* Stat. 14 Geo. 2. c. 20.

Præcipe, and declaring the uses. This Deed must be proved by the subscribing witness.

6. The question often arises in trial of Ejectments, as to whether lands were *parcel or not parcel,* or in one parish or another.

As to this head, it may be proved either by witnesses or written documents. The declarations of Persons deceased on the subject, and who were acquainted with the Parish, as to the common opinion of the place, and who had no interest in making any misrepresentation respecting it, is admissible Evidence. (*s*)

Perambulations made at different times by the Parish, are also good Evidence of the boundaries of the Parish Witnesses must prove the fact, and it should seem, that they should be proved to have been made at stated periods. (*t*)

As to written Evidence, *old leases and rent rolls* have been admitted in favour of a Party claiming under the Lessor. (*u*)

So also in these Cases, an *old Terrier of a manor* ecclesiastical or temporal may be given in Evidence: (*x*) but where such Evidence is offered, it must be proved where such Terrier was had from.

7. If the Ejectment is by one Tenant in Common against another, to recover his part of the Pre-

(*s*) Nichols *v.* Parker, 14 East. 331, *in not.* Barnes *v.* Mawson, 1 M. and S. 81.

(*t*) Weekes *v.* Sparke, 1 Maul. and S. 687, 689.

(*u*) Phillips on Evid. 240.

(*x*) Bull. N. P. 248.

mises; (y) the Plaintiff must shew, that the Defendant claimed the whole Estate, and refused to admit him to any part, which will be sufficient: (z) but it will not be sufficient, to shew, that the Defendant took all the profits; the Plaintiff should, therefore, always be prepared with proof, of his demand of his part, made on the other Tenant in common, and a refusal by him.

8. If an Ejectment is brought for *Tithes*, or for a Rectory.

The Lessor of the Plaintiff must prove, that he was admitted, instituted, and inducted into the Rectory, (a) had read and subscribed the thirty-nine articles, and declared his assent and consent to every thing contained in the Book of Common Prayer.

Institution alone is not sufficient; and in fact it is right in every case to prove presentation by the Patron to the Rectory. (b)

The Letters of Presentation are addressed to the Bishop of the Diocese, and are to be found with his Register, who will produce them.

The admission, induction, and taking possession of the Living must be proved; and as they take place in the Church, the facts above required may be proved, either by the Clerk of the Parish, some of the Pa-

(y) 1 Esp. Dig. N. P. 442.
(z) Doe ex d. Hellings *v.* Bird, 11 East. 49.
(a) Snow *v.* Phillips, 1 Sid. 220.
(b) Heath *v.* Pryn, 1 Vent. 14.
(c) Latch. 62.

rishioners, or any Clergyman who might have been assistant at the Ceremony.

But the mere fact of taking the Tithes is clearly not sufficient. (c) And an entry on the Glebe should be proved.

9. If the Ejectment is brought, by the *Purchaser of a Leasehold interest from the Sheriff*, sold by him under an execution by *Fi. fa.*; the Judgment in the original Action as well as the Writ and Sale by the Sheriff, must be given in Evidence; the Judgment and Writ by examined copies of them: the sale is proved by witnesses, and the Bill of sale by the subscribing witness. (d)

10. If the Ejectment is brought for Lands, which are *Ancient Demesne*, and it becomes necessary to prove it, it is done by an inspection of Domesday Book, and an examined copy. (e)

It was once held to be necessary at the Trial of an Ejectment to be prepared with proof that the Defendant was in possession of the Premises, for which the action is brought. Which was done by proof of actual enjoyment; or, if let, by calling the Tenant who paid rent to the Defendant. But that is now rendered unnecessary by the rule of Court. *Ante*, 345.

(d) Doe ex d. Bland v. Smith, 2 Stark. 199.

(e) Anon. Hob. 188. Gilb. Evid. 69.

CHAPTER X.

OF SETTLING EVIDENCE IN THE ACTION OF SLANDER.

IN settling the Evidence in the Action for Slander by Words or Libel, the first step is to compare the Record with the Words or Libel, laid in the Declaration, before it is brought on to Trial; as any variance is fatal. To lay the words in one sense, and to prove them spoken in another, is fatal; and in the case of a Libel, the smallest variance will nonsuit. It is always read first at the Trial; and if, on comparing it with the Record, there is any variance in the sense, meaning, expression, or words used, the Plaintiff is nonsuited. In settling the Evidence, therefore, in this Action, these Rules are to be observed:

1. The Plaintiff in this Action, *if for words,* is bound to prove the words laid in his Declaration. This must be by some witness who heard the Defendant speak them; and if they are of ambiguous meaning, he must also prove that he understood them in the slanderous meaning imputed to them. (*a*)

(*a*) 2 Esp. Dig. N. P. 23.

As if the Action was for calling a man a "Thief." Where the words are proved by the witness; he must also prove, that he believed the Defendant meant to *impute the commission of a felony to the Plaintiff;* for the word *Thief* is often used in joke, or without charging the Party with having stolen any thing. It must therefore be proved, that the Defendant meant to impute felony to the Plaintiff.

2. If the Action is for *a Libel* or written Slander, the Plaintiff must produce the Letter or Publication in which the Slander is contained; but if it is a Letter or Pamphlet, paragraph in a Newspaper, or printed essay, it must appear that it is libellous, taking the whole of the work together; for which purpose the Defendant is entitled to have the whole read. If by the reference of one part to another, or by explanatory observation, the parts may be so connected, that in the whole it is not a Libel, though detached passages may bear that imputation, the Defendant would have a Verdict. But detached paragraphs or sentences, if not so explained, may be libellous. The Plaintiff must then prove the publication; that is, that the Letter, Publication, or Pamphlet, was sent to be copied by, or shewn to, or read by, a third Person. A Newspaper, from its nature, implies publication.

It is obvious therefore, in preparing the proofs for Trial in this Action, where it is for slanderous words, how necessary it is, to be accurate in taking down from the mouths of the Witnesses, the very words used by the Defendant; for, although they may not prove all the words, there may yet be *sufficient* of them proved to support the Action: but if they are of a dif-

ferent import: or spoken in a different sense or manner, the Action must be abandoned.

For though the Plaintiff must prove the words, he is not bound to prove the whole of them precisely, or in the very terms in which they are laid in the Declaration; (*b*) it is sufficient to prove some material part of them, that is, so much as will be actionable, standing by themselves. (*c*) And although they may be substantially the same in point of sense and manner of speaking; yet, if proved by equivalent words only, it will not be sufficient: so, if they are stated on the Record affirmatively, and the proof is with some variation in the expression, as the proof must correspond, the Evidence is insufficient. (*d*)

Therefore, if the words are laid to be spoken of the Plaintiff in one person, and proved to be spoken of him in another, as if laid, "He is a Swindler," and these proved are "You are a Swindler," that Evidence will not support the Declaration; for the words are substantially different when spoken *of*, or *to*, a Person. (*e*)

So if the words are laid positively; as "A. B. cannot pay his labourers," and the Evidence is, that they were spoken interrogatively, "Have you heard that A. B. cannot pay his labourers?" that will not

(*b*) Bull. N. P. 5.
(*c*) Barnes *v.* Holloway, 8 T. Rep. 150. Maitland *v.* Goldney, 2 East. 434. Figgins *v.* Cogswell, 3 M. and S. 369. Walters *v.* Mace, 2 B. and A. 756.
(*d*) 1 Phill. on Evid. 191.
(*e*) Bull. N. P. 5.

support the Declaration, for their import is different. In one sense they assert matters as a fact; in the other, they only allude to report.

3. Where words are spoken, or a Libel written, of a Person in any Profession, Business, or Situation, and which are actionable only as alluding to such Profession, Business, or Situation; that the Plaintiff is a Member of, or belongs to it, must be proved, as laid in the Declaration.

As if a Physician was to bring an Action for calling him a Quack, he would be bound to prove a Diploma from the College of Physicians allowing him to practise, or a regular degree of Doctor of Physic from some of the Universities: the Evidence for this purpose, may be by the original Book of the University or College, which contains an entry of the Degree being conferred, or it may be proved by an examined copy of the entry. If the written Instrument is produced, as the original Act of the University or College, which conferred the Degree, the Seal of the University or College granting the Degree or Diploma ought to be proved by a witness who knows it to be the Seal of the University or College it purports to be.(*f*)

But, in the case of an Attorney, it is sufficient to prove his having conducted Suits, and practised as such. (*g*)

(*f*) Moises *v.* Thornton, 8 T. Rep. 303.
(*g*) Berryman *v.* Wise, 4 T. Rep. 366. 2 Esp. Dig. N. P. 24.

4. Where words are actionable only, as spoken of a Person in a particular character or situation, or as alluding to any particular transaction; as, for example, if there was a conversation or *colloquium* respecting the circumstances of any Person, which, under particular circumstances, might be actionable or not; the *colloquium* must be proved as introductory of the Slander. This must be done by a witness who was present and heard it. (*h*) And he must further prove, that the words applied to the particular transaction or matter, which was the subject of the *colloquium* at the time.

5. The Plaintiff cannot go into Evidence of any special damage arising from the Slander, unless he has laid it in his Declaration; and then he is confined to that only: (*i*) as, for example, if the Plaintiff laid his special damage to be the loss of the custom of T. S., which in the language of the Declaration is laid, "whereby he lost the custom of T. S. and of *divers* other good *and worthy subjects,*" the Evidence would be confined to the damage from the loss of the custom of T. S. only, and the Plaintiff could not give Evidence of the loss of any other. (*k*)

But having proved the words laid in the Declaration, he may, in order to prove malice, give in Evidence other words spoken by the Defendant, although not stated in the Declaration. (*l*)

(*h*) 2 Esp. Dig. N. P. 24.

(*i*) Browning *v.* Newman, 1 Stra. 666.

(*k*) 2 Esp. Dig. N. P. 23.

(*l*) Warne *v.* Shadwell, 2 Stark. 457.

6. Where words are actionable by reason of some special damage arising from them, but which are not so of themselves; as to say of an unmarried woman, "she had a Bastard," which words are not of themselves actionable: but if the Declaration went on to state "by which J. N. who would have married her, refused to do so," the Plaintiff must prove the special damage as laid, or she will be nonsuited; for it is that damage only which will sustain the Action. And, according to the preceding rule, the Plaintiff must prove that in consequence of the words, J. N. refused to marry her, and cannot be admitted to prove, that for the same reason, any other Person refused to marry her. (*m*) J N. should be therefore called as a witness.

7. Though the Declaration lays the speaking of the words on a particular day, the Plaintiff may give Evidence of the same words, or of words of the same import, spoken by the Defendant at other times: but he cannot give Evidence of *other actionable words* spoken by him at other times. (*n*) So, in the case of a Libel; the Plaintiff cannot give Evidence of other Libels published of him by the Defendant, unless they refer to the Libel stated in the Declaration, in which case he may.

8. As the most general case of Libel is for some publication in the Newspaper, the Evidence to fix the Publisher or Printer is regulated by Stat. 38 Geo. III. c. 78. *quod vide.* But in every Case, it

(*m*) Martin *v.* Henrickson, 2 Ld. Raym. 1007.
(*n*) Finnerty *v.* Tipper, 2 Campb. 72.

is essential, to support the Action for a Libel, that the Plaintiff proves the *publication* of it. This means no more, than that the Defendant has communicated to third persons, the Libel complained of. Publishing a libellous paragraph in the Newspaper: a pamphlet or song, which is publicly sold: placarding the matter at the corner of the street: all these are clear publications; and in whatever way their publication was made, must be proved at the Trial by witnesses. But, as if the publisher of a Newspaper, give up the author of a Libel, he will be liable, the publication in the Newspaper must be first proved, and then by the Printer, that he received the paragraph in question from the Defendant. And the publication of Slander may be by letter written to others, containing the Libel complained of. If the libellous letter was addressed to the Plaintiff himself, his only remedy would be by Information or Indictment: but where the Defendant addressed a libellous letter to the Defendant, knowing that his Clerk opened all his letters, it was held to be Evidence to go to the Jury, whether the letter was not intended to be read by a third Person, which would be a publication of it. (*p*)

In an action against a Bookseller or Publisher of a Libel, it is sufficient proof of the publication, that it was bought at his shop, and by the Printer of a Newspaper by his Bond to the Stamp Office. (*q*)

9. Where the *initials of the name* only are used, or there is any doubt of the application of the words, the Plaintiff must call witnesses to prove, that he

(*p*) Delacroix *v.* Thevenot, 2 Stark. 63.

(*q*) Rex *v.* Topham, 4 T. Rep. 126.

was the Person designated, or that the words used applied to him, and that the witnesses so understood them.

10. If the Action is slander of *title*, as the Declaration states the description of the property of the Plaintiff to which the slander of title applies, the proof must accurately correspond with it; if it does not, he will be nonsuited. As, where the Plaintiff stated, his putting up to sale his interest in certain Premises, which he described "as the residue of a term for ninety-nine years;" but the Evidence was, that he had not put up that interest for sale, but a *proposed Lease for twenty-one years*. It w s held to be a fatal variance; and the Plaintiff was nonsuited. In settling the Evidence that must be accurately attended to. (*q*)

In an action for Slander of title, the Defendant may shew, that he claimed *title in himself*; and it is a good defence. (*r*)

Of the Evidence by the Defendant.

1. The Defendant may give in Evidence; that *the words* which he spoke or wrote in the imputed Libel, *are true*: but this is *only admissible in Evidence, where the Defendant has pleaded that they are so.*

2. The General Issue in Slander is Not Guilty. This puts the Plaintiff on proof of the words. laid

(*q*) Millman *v.* Pratt, 2 Barn. and C. 486.
(*r*) Smith *v.* Spooner, 3 Taunt. 246.

in the Declaration: but the Plaintiff is confined in his Evidence to them, and such averments as he states in his Declaration. Therefore, where the Defendant pleads *Not Guilty* to an Action for a Libel, he cannot give in Evidence, *that the assertions in the Libel are false*: or subsequent declarations made by the Defendant of his motives for publishing the Libel, where the intention of such publication is not equivocal. It is useless, therefore, though often done, to add such proofs to the Evidence: (s) but, as far as respects the Defendant, it is not a mere denial that he spoke the words, but that he spoke them not slanderously; for though the words taken literally may be actionable as written or spoken, the Defendant may give Evidence, that they were not spoken in the actionable and slanderous sense imputed to them, but with a different import. This is done, by the Defendant calling witnesses to speak to the subject of the conversation when the words were spoken, or the manner in which they were applied; as if the Plaintiff brought an Action, for words imputing to him the crime of murder, and the Defendant proved that the words were spoken by him in conversation respecting the Plaintiff's having killed Game, and the Defendant was to say, "He is a murderer," meaning to apply that term to the quantity the Plaintiff had killed; the words in that case would not be actionable. This defence is proved by Persons who heard the words spoken, and can give Evidence of the sense in which they were used.

(s) Stuart v. Lovell, 2 Stark. 93.

So the Defendant may give in Evidence under his Plea, what amounts to accord and satisfaction, as if the Plaintiff had said; that if the Defendant would do certain things, as *e. g.* burn some Letters, he would give up this Action; that would amount to accord and satisfaction. In settling the Evidence, therefore, for the Defendant, proof of such facts, if they took place, should be brought forward. (*t*)

So he may prove, that he used the words as Counsel in a Cause, and that they were applicable to the case; (*u*) or that he spoke or wrote them in confidence. As if on inquiry of the Defendant as to the solvency of a Person in trade, or of the character of a Servant, he was to say, that he thought the former in very doubtful circumstances, or the latter a Servant addicted to dishonesty or drunkenness, meaning to give a fair and honest caution to the Person inquiring: Evidence that the words were so spoken or written, would render the words not actionable. (*w*) These facts are proved by witnesses, who are allowed in such cases, (though not generally) to speak from opinion, as to what object and with what intention they were spoken.

4. The Defendant may prove that the supposed Libel was a privileged communication, and made in the performance of a public duty.

As a sentence by him as President of a Court

(*t*) Per Lord Ellenborough, Lane *v.* Applegate, 1 Stark. 97.

(*u*) Brook *v.* Montague, Cro. Jac. 90. Hodgson *v.* Scarlett, 1 Barn. and A. 232.

(*w*) Weatherstone *v.* Hawkins, 1 T. Rep. 110.

Martial, or as a Report on a Court of Inquiry, ordered to assemble by order of the Commander in Chief, to inquire into the conduct of an Officer, (x) In these cases, the Defendant should shew that the Court Martial was regularly constituted, or the Court of Inquiry regularly formed, pursuant to the order of the Commander in Chief, which should be produced; and it should then be proved, that that which was relied on as a Libel, was part of the sentence of the Court Martial, or the Report made to the Commander in Chief. This however is not always necessary, if the Declaration on the Libel so states it: but if the Plaintiff relies on the circumstance, of the Defendant having exceeded his powers, or abused his authority, the Defendant should be prepared with Evidence as to the powers with which Officers are invested on those occasions.

5. In case of Libel, the Defendant under the General Issue may give in Evidence, in mitigation of Damages, that the Plaintiff was before the publication, suspected of being guilty of the crimes imputed to him in it. That is, the Defendant may give in Evidence *rumours* against the Plaintiff's character, to shew that he has sustained no injury: but he cannot give *facts* in Evidence, unless they are pleaded in justification. (y) This distinction must therefore be attended to in settling the Evidence; for which purpose, Persons should be called to prove their

(x) Jekyll *v.* Sir John Moore, 6 Esp. N. P. C. 63. and Home *v.* Bentinck, 2 Br. and B. 130.

(y) Per Abbott, C. J., Waithman *v.* Weaver, 1 Dowl. and R. N. P. C. 10.

having heard Reports injurious to the Plaintiff's character, of the same description as those, for the imputation of which the Action is brought, as in the case cited, that the Plaintiff has been spoken of as having been guilty of them ; and it should be attended to, that that is only allowable where the General Issue is pleaded. (*z*)

Neither is it competent for the Defendant under the General Issue to give in Evidence, in mitigation of Damages, that the specific facts in which the slander consists, and for which the Action was brought, were communicated to him by a third Person. (*a*)

(*z*) 2 Esp. Dig. 28. Earl of Leicester *v.* Walter, 2 Campb. 251. —— *v.* Moor, 1 M. and S. 284.

(*a*) Mills *v.* Spencer, Holt's N. P. C. 533.

CHAPTER XI.

OF SETTLING THE EVIDENCE IN THE ACTION FOR MALICIOUS PROSECUTION.

THE Action for Malicious Prosecution, is founded on the injury which the Plaintiff has sustained, by some unjust and oppressive legal Proceedings instituted by the Defendant against him: such as preferring a charge before a Magistrate of Felony or Misdemeanor: unjustly indicting him or arresting him for a Debt not due, or for more than is due. The principle is the same in all; and, therefore, the settling of the Evidence for the Plaintiff is best done, by attending to a few general rules applicable to all cases.

I. It is laid down as a general rule in this Action, that to entitle the Plaintiff to recover in it, he must shew the Proceedings instituted against him by the Defendant and prove, that they were instituted without any probable cause, and proceeded from malice; and the Plaintiff must establish both malice and the want of a probable cause, by clear Evidence. But he is not called upon to give *direct Evidence* of malice; for if he proves an absence of probable cause, malice will be inferred. In settling the Evidence therefore in this Action, it is only necessary, to disprove the charge imputed to the Defendant by the Plaintiff, and for the injuries arising from which he complains,

and by clear Evidence to shew it unfounded: but if he can also bring forward Evidence, such as vindictive expressions or proceedings of the Defendants, they should make part of the Proofs, as tending to increase the Damages.

The Plaintiff, therefore, in this Action, must first give in Evidence, the Proceedings themselves which the Defendant issued or procured to be issued against him; as if the Plaintiff declares, "That the Defendant procured him to be taken into custody under a Warrant granted by a Justice of Peace on his information," the Information must be produced: this is done by subpœnaing the Justice of Peace or his Clerk with a *duces tecum* of the original Information, and proof by them that it was made and sworn to by the Defendant; and then the Warrant granted on it, which is either in the hands of the Constable or Justice, must be produced. The arrest and detention of the Plaintiff under it must be next given in Evidence, and the discharge by the Justice. (*a*)

He must then prove, that there was no colour for making the charge, or taking him up on the Warrant: such as that he was at another place, or was confined with illness, at the time the imputed offence was committed: so that the charge against him could have no foundation. This can be proved by Witnesses, and requires clear Evidence; for if by possibility he could be guilty, from suspicious circumstances at the time,

(*a*) 2 Esp. Dig. N. P. 29.

so that the Defendant might have been deceived, and no malice is proved, the Defendant will have the Verdict.

2. If the *Prosecution was by Indictment,* the Plaintiff must prove the Defendant to have been the Prosecutor: for this purpose, though his name may be on the back of the Bill, that will not be sufficient; it proves him to be a Witness only, but not the Prosecutor. (*b*) He may, therefore, establish that fact, by calling one of the Grand Jury who found the Bill, (*c*) or the original Information taken before the Justice as stated before; give in Evidence a copy of the Indictment and Acquittal, examined with the original, either in the King's Bench or Quarter Sessions; or the original Proceedings may be produced by the Officer of the Court where the Indictment was preferred. But if the Indictment was for Felony, as no Action will lie in that case, where the Defendant has been acquitted, unless the Court grant a copy of the Record and Acquittal; Evidence must be given to that effect, and the leave be proved; (*d*) in which case there should be an order from the Attorney-General to the Officer of the Court, to produce the Record of Acquittal, and the order of the Court. The copy of the Indictment, if produced, must be proved by a witness who examined it with the original, and then Evidence be given of the Trial and Acquittal of the Defendant; for which purpose the Record or an ex-

(*b*) Bull. N. P. 14, 1.
(*c*) Sykes *v.* Dunbar, Selw. N. P. 1035.
(*d*) Legatt *v.* Tollervy, 14 East. 302.

amined copy, is sufficient; and should be given in Evidence.

In a case however, for maliciously charging the Plaintiff with an Assault, before a Magistrate, and where the Depositions were returned by him to the Sessions and a Bill of Indictment preferred by the Defendant which the Jury ignored. The Clerk of the Peace having proved, that when a Bill of Indictment was thrown out by the Jury, he usually destroyed or threw away the Depositions, and those in the present case having been searched for and not found: it was held to be sufficient Evidence of their destruction, and parol Evidence of their contents was held to be admissible. (*e*)

3. If the Action is for a *Malicious Arrest*, either where there was nothing due by the Plaintiff to the Defendant, or the arrest was for a much larger sum than was really due, if the Plaintiff states that he was held to Bail for a certain sum, by virtue of an Affidavit made by the Defendant, he must produce an examined copy of the Affidavit made by the Defendant to hold him to Bail: but he may give in Evidence the original Affidavit, and prove the hand-writing of the Defendant subscribed to it. But as that averment is now usually omitted, and the arrest stated generally, the Writ, with an Indorsement on it, to hold to Bail for the sum mentioned, must be produced; and it will be sufficient Evidence. (*f*) The Plaintiff must then

(*e*) Freeman *v.* Arkell, 2 Barn. and C. 494.

(*f*) Per Buller, J., 2 Esp. Dig. N. P. 38. Bull. N. P. 14.

prove an actual arrest at the Defendant's Suit, which is done by the Officer of the Sheriff to whom the Writ was directed. He must then prove, that the Suit in which he was so arrested, was terminated, either by a Judgment of nonsuit, non pros, or verdict, or discontinuance, so that it should appear that the Plaintiff had no cause of Action. (*g*)

4. In all the cases now put, the Plaintiff is bound to prove, that the Proceedings were groundless, and without any probable cause, and that known to the Defendant. (*h*) As, *ex. gr.* if he had been taken on a charge made before a Justice of Peace; he may prove, that he was not present when the imputed offence was committed, or was in another place, so that he could not be guilty, and that the Defendant knew it: in like manner, if indicted, he may give similar Evidence; and if he was arrested for more than was due, he may shew, a settlement of accounts before the arrest, made between him and the Defendant, and a small balance then struck as only due, notwithstanding which, the Defendant had arrested him for a larger sum.

This Evidence is indispensable: for it will not support the Action for the Defendant to prove, that though taken up under a Warrant, the Plaintiff did not indict him: or that the Grand Jury threw out the Bill. (*i*) If, therefore, the Plaintiff has no other Evi-

(*g*) 2 Esp. Dig. N. P. 38. Webb *v.* Herne, 1 B. and P. 281.
(*h*) 2 Esp. Dig. N. P. 30.
(*i*) Purcell *v.* M'Namara, 1 Camph. 199.: S. C. 9 East. 361.

dence than what arises from inference as just stated, he cannot proceed in the Action.

These are cases, where there have been Proceedings by the Defendant without any probable cause: in which case, from such want of probable cause malice will be inferred: but although the Plaintiff be in possession of such Evidence, it will not be sufficient to give Evidence of actual malice, however strong it may be; such as Declarations made by the Defendant, that he would ruin the Plaintiff, and others of similar malevolence; unless the want of a probable cause is brought home to the Defendant. For it was held by Le Blanc, J. in a Case where there was strong Evidence of malice, that the Defendant could not be called on for his defence, until some Evidence was given of want of probable cause; though under the circumstances, slight Evidence might be sufficient. (*k*) In settling the Evidence therefore in this Action, unless there is some Evidence of a want of probable cause, the Action must be abandoned. (*l*) But Evidence of actual malice being admissible to any extent, it is always advisable to have it; (*m*) such as advertisements put into the Newspaper, mentioning, *e. g.* without any apparent reason for it, that a true Bill of Indictment was found against the Plaintiff. Expressions of ill-

(*k*) Sykes *v.* Dunbar, 1 Campb. 202. in not. Incledon *v.* Barry, 1 Campb. 203. in not. Per Le Blanc, J.

(*l*) *Vid. et* Turner, Bart. *v.* Turner, 1 Gow. 20. S. C.

(*m*) Chambers *v.* Robinson, 1 Stra. 691.

will towards the Plaintiff, which the Defendant may have been heard to use to the witness called.

These matters of Evidence it is impossible to specify; and the others depend on the averments in the Declaration; such as being put to great expense: the Plaintiff should be, therefore, prepared with proof of the amount.

5. But in every case, the Plaintiff must prove that the Proceedings which the Defendant had instituted against him, are at an end. (*n*) As in the case first put; he must shew, that the Justice dismissed the complaint; in the second, his Acquittal; and, in the third, that the suit commenced by the arrest was at an end, either by a verdict, judgment of *nonsuit, non pros,* or *discontinuance,* in which case of a *Verdict, nonsuit,* or *non pros,* he must have an examined copy of the Judgment Roll; in the second, he must produce the Rule to discontinue; and prove the costs paid. (*o*) And all these proceedings must be proved by written Evidence, and cannot be dispensed with. (*p*)

6. In preparing and settling the Evidence for Trial in this Action, the greatest attention must be observed, in comparing the *written Evidence* with the Declaration, and seeing that the *parol* corre-

(*n*) 2 Esp. Dig. N. P. 31. Bull. N. P. 13. Savil *v.* Roberts, Salk. 12. Fisher *v.* Bristow, Dougl. 205.

(*o*) Gadd *v.* Bennett, 5 Price 510.

(*p*) 2 Esp. Dig. N. P. 38.

sponds with the averments to be proved, as any variance in that respect is fatal.

Thus, if the Declaration stated, that the Plaintiff had been maliciously arrested, and held to Bail on a Writ returnable in *Easter Term*, and the Writ when produced appeared to be of *Trinity*: If the Declaration stated, that the Plaintiff had been maliciously taken into custody under a Warrant for *Felony*, and the Warrant when produced was for a *Misdemeanor, or on suspicion*, the Evidence would vary from the Declaration, and the Plaintiff would be nonsuited (*q*)

7. The objects of special damage, are matters stated in the Declaration, and vary with the case. Thus, in the case of a malicious arrest, if the Plaintiff averred that he was in trade, and in consequence of it having got abroad that he had been arrested, that other Creditors had arrested him, who would not have done so, but on account of their belief that his credit was bad, concluding it to be so, by reason of his arrest; the Persons who so arrested him must be called as witnesses to prove, not only the arrest of the Plaintiff, but their motives for doing so. But in every case, the Plaintiff must have been put to certain expenses: these are always laid in the Declaration, and are proved at the Trial by witnesses; and will of themselves support the Action. (*r*)

(*q*) Leigh *v.* Webb, 3 Esp. N. P. C. 165. Pope *v.* Foster, 4 T. Rep. 590. Tempest *v.* Chambers, 1 Stark. 67.

(*r*) Smith *v.* Hixon, 2 Stra. 977.

Of the Evidence for the Plaintiff in an Action for a Conspiracy.

This Action, as to its object, differs nothing from the Action for malicious Prosecution, except that more persons than one are implicated in it; and the same Evidence is required. (*s*) If the Action is for a Conspiracy, two at least must be found Guilty: but if the Action is *Case* in the nature of a Conspiracy, a verdict may pass against one only. (*t*)

2. *Of the Evidence for the Defendant.* (*u*)

The General Issue in this Action is Not Guilty; and under it the Defendant may go into any Evidence to justify the proceedings for which the Action has been brought against him. *He may shew a probable cause*, which in all cases is sufficient. As if the Action was for suing out a Warrant, and taking the Plaintiff into custody for a Felony, the Defendant may give in Evidence, a Felony committed; and that the Plaintiff was seen near the place at the time, under suspicious circumstances: (*x*) this is matter of parol Evidence. In fact, the Defendant may give every thing in Evidence which tends to his exculpation, as having reasonable grounds of suspicion, and disproves malice; and proof is not required beyond fair presumption. Therefore, the Jury finding a

(*s*) Johnson *v.* Browning, 6 Mod. 216.
(*t*) Subley *v.* Mott, 1 Wils. 210.
(*u*) 2 Esp. Dig. N. P. 38.
(*x*) Mills *v.* Mills, Cro. Car. 239.

true Bill against the Plaintiff, though he was afterwards acquitted, was held to be proof of a probable cause. (*y*)

So he may go into Evidence of the general bad character of the Plaintiff; and call witnesses to prove his general bad reputation. (*z*)

(*y*) Savill *v.* Roberts, 1 Salk, 13. 2 Esp. Dig. N. P. 38.
(*z*) Rodriguez *v.* Tadmire, 2 Esp. N. P. C. 721. 12 Co. 92.

CHAPTER XII.

OF THE EVIDENCE FOR THE PLAINTIFF IN THE ACTION OF TROVER.

THE leading points of Evidence indispensable to be proved by the Plaintiff in the Action of Trover are, 1. A property in himself in the things for which the Action is brought. 2. A right to the present or absolute possession of them. And, 3. That the Defendant converted them to his own use, or refused to deliver them to the Plaintiff after demand. An absolute property in the Goods is not required; a special property, such as that of a Sheriff, Carrier, &c., will enable the Person having it, to maintain the Action against a stranger. The Defendant can therefore dispute the Plaintiff's right of property; as he may shew not only property in himself, but also that they belong to a third Person; and such Person may be called as a witness to prove it. *(a)*

The Plaintiff can, however, recover those things

(*a*) Ward *v* Wilkinson, 4 Barn. and A. 410.

only which are specified in the Declaration: and these must be demanded before Action brought. In case of some things for which Trover lies, such as *Deeds, and writings,* the proof is not required to correspond accurately with the description in the Declaration, provided the Instrument is substantially the same. Therefore, where the Declaration was for "a certain deed of Assignment bearing date, &c., between A. B. of the one part, and C. D. of the other, "purporting to be a conveyance of certain premises at &c;" it was held that, though the deed produced was not an Assignment, but a conveyance by lease and release, but the date, parties, and property being the same, it was held to be sufficient Evidence. (*b*)

In this Action, more questions of personal property are tried than in any other, in cases where Parties became possessed of such property under particular circumstances; such as by sale without delivery; by sale and imperfect delivery, as where the goods are stopped *in transitu*; by sale of a Factor or Agent; by sale of the Sheriff; by pledging, &c. (*c*)

In settling the Evidence for the Plaintiff, each of these cases must be attended to.

1. *In the Case of a Sale without delivery.*

If a man sells Goods to another who pays for them, and the Seller afterwards refuses to deliver them upon

(*b*) Harrison *v.* Vallance, 1 Bingh. 45.
(*c*) 2 Esp. Dig. N. P. 40.

the Plaintiff's demand: the payment for them gives the Plaintiff such a property in them as entitles him as Buyer to maintain the Action. And, in support of it, he must give the Evidence following, 1. Of the sale to him: the price at which he purchased them: and that he paid for them. This need not be of the whole price, unless the agreement was, that the whole should be paid before the Plaintiff was to have the goods: a partial payment will be sufficient. This may be proved by *vivâ voce* Evidence. And, 2. A demand from the Defendant to have them delivered to him, this will entitle the Plaintiff to a verdict for their value, at Nisi Prius.

If the Defendant sold the Goods by a Factor, Agent, or Servant, who was authorised to sell; that equally binds the Principal to deliver them, and subjects him to an Action in the same way: (*d*) but the Factor, Agent, or Servant, should be called to prove his authority to make the sale on the Defendant's account; or, in case they cannot be had, Evidence that the Person who sold the Goods was employed by the Defendant in the course of business to make sales for him, which the Defendant had subsequently adopted, will be sufficient, and which may be proved by those with whom the Defendant has so dealt. Where however, the Factor, Agent, or Servant, can be called this Evidence ought not to be resorted to, as it is not the best: but if it is suspected, that those Persons will withhold the truth, the Plaintiff should be prepared with Evidence as above. As in case they had a

(*d*) Heyman *v.* Neale, 2 Campb. 337.

special authority only and had exceeded it, their Principal would not be bound by their contract. (*e*)

Where the Buyer has so paid for the goods before hand, the Seller can have no pretence for withholding them: but where the contract of sale is complete, but the goods are not delivered; nor the price paid, and the buyer in this Action seeks to enforce the contract, and brings his Action against the Seller for the non-delivery of them, the Evidence which the Defendant may give in reply in such case, is such as shews, that there was fraud in the purchase, or good ground for rescinding the contract, or for refusing to perform it. Such as the purchaser having stopped payment before the Goods reached him, after having given bad Bills which had been refused acceptance, which is fraudulent. So is the Seller's right of stopping of the Goods *in transitu,* where the insolvency of the Buyer is discovered before they reach him. (*f*) In that case, the Defendant is bound to prove the grounds of his stopping his Goods before delivery for some well grounded suspicion of the Plaintiff's insolvency. (*g*) Such as a Docket having been struck against the Plaintiff the Buyer, or against the Persons whose names are on the Bill given in payment for them; that he or they were uncertificated Bankrupts, or the like. These facts and others to the same effect, must be proved in Evidence at the Trial.

(*e*) East India Company *v.* Hensley, 1 Esp. N. P. C. 111.
(*f*) 2 Esp. Dig. N. P. 40.
(*g*) Walley *v.* Montgomery, 3 East. 585.

The right of the Seller to *stop his Goods in transitu* has given occasion to numberless Actions. One thing is however perfectly well settled, that if the Goods come into the Buyer's possession, before any act done by the Seller to stop them, his right to stop them *in transitu* is at an end. (*h*) This, as a principle, is unquestioned; and if proved by the Buyer, establishes his right. The questions therefore, in these cases, turn upon what has been done by the Seller, and whether it amounts to a stoppage *in transitu* in time to entitle him to regain his Goods. As these are facts varying with every case, they cannot be subjected to any general rule in settling the Evidence. (*i*)

2. If the Goods had been sent to a Factor to be sold, and he in place of selling had *pledged* them, (*k*) the Owner may recover them at once from the person who has got them; for such a pledge does not change the property; (*l*) and, to prove the transaction, the Plaintiff may call as witnesses, either the Factor himself, or his clerk, or the servants of the person with whom he pledged them. But the delivery to the Factor, to be sold as a Factor; and the fact of pledging them, must be proved.

3. If a man has bought Goods, which have been

(*h*) Ellis *v.* Hunt, 3 T. Rep. 464.

(*i*) Patten *v.* Thompson, 5 Maule and S. 350.

(*k*) 2 Esp. Dig. N. P. 41. Paterson *v.* Tash, 2 Stra. 1178.

(*l*) Smith *v.* Field, 5 T. Rep. 402. Daubigny *v.* Duval, 5 T. Rep. 601. Newsom *v.* Thornton, 6 East. 17. M'Combie *v.* Davis, 7 East. 5.

stolen, the Owner may recover them back in this Action from the Buyer, provided he has prosecuted the Felon to conviction. (*m*)

Where Trover is brought to recover Goods under such circumstances, the Plaintiff must prove, 1. That the Goods were his, and were stolen from him. 2. He must produce an examined copy of the Record of the conviction of the Felon for stealing the Goods claimed. (*n*) This is done by a witness who examined the copy produced with the original, or it may itself be produced by the Officer. He should also establish, that the Goods, laid in the Indictment to have been stolen, were those which he had lost and which he claims to recover by the Action. He must, lastly, shew that the Defendant was in possession of them, and that he demanded their restitution.

The Plaintiff must prove the Defendant to have been in possession of the Goods *when he demanded* them ; for if he had parted with them before they were demanded, he would not be liable. (*o*)

So it must appear, from the copy of the Record produced, that the prosecution was for *felony ;* for if it appears that it was for *fraud* only, as by obtaining them *by false pretences ;* the owner cannot recover them. (*p*)

(*m*) 2 Inst. 714. 2 Esp. Dig. N. P. 42. Horwood *v.* Smith, 2 T. Rep. 750.

(*n*) Horwood *v.* Smith, 2 T. Rep. 750.

(*o*) *Id. Ibid.*

(*p*) Parker *v.* Patrick, 5 T. Rep. 175.

4. In this form of Action, (*q*) questions are continually occurring as *to Bills of Sale* given as security, or supposed security, for Debts : Assignments made for the benefit of Creditors, or such conveyances as are intended to divest the property in Goods out of the Party making them, and which are sought by *bonâ fide* Creditors to be set aside on the ground of Fraud. (*r*)

A Debtor may give a preference to a *bonâ fide* Creditor or Creditors ; and if the Creditor under such circumstances has taken a Bill of Sale, Assignment, or Security, by Warrant of Attorney to confess a Judgment, voluntarily given, he may stand on his rights ; on giving Evidence. 1. That the debt for which the Bill of Sale, Assignment, or Warrant of Attorney was given, was actually and *bonâ fide* due to him, and the security given to protect it. (*s*) 2. By shewing, that having so obtained that security from his Debtor, he immediately proceeded to give effect to it, by taking possession of the property passed by the Bill of Sale, or other Security, and proceeding to dispose of it in due time, or by entering up Judgment on the Warrant of Attorney immediately. (*t*) A Bill of Sale given to another being only void, where there was no consideration given or possession taken.

This Evidence is given, by shewing how the debt

(*q*) 2 Esp. Dig. N. P. 43.
(*r*) Stat. 13 Eliz. Ch. 5.
(*s*) Holbird *v.* Anderson, 5 T. Rep. 235.
(*t*) Estwick *v.* Caillaud, 5 T. Rep. 420.

was contracted; as by Bond, Bill, Note, or for Goods sold. The fact of entering and taking possession may be proved by the person put into possession, and the signing of the Judgment and Execution as before mentioned in similar cases.

But as to give effect to these securities, where the validity of them is impeached, (*u*) the Party who relies on them, whether he is Plaintiff or Defendant, must be prepared to prove not only a good consideration, but an actual and *bonâ fide* taking possession of the effects under the Bill of Sale or Assignment, strict proof of the latter is required; (*x*) for which purpose, the best witness is the person put into actual possession. He must prove, that from the time of his taking possession, the original Owner was suffered to exercise no act of Ownership whatever; for if he did, as it would be incompatible with the supposed assignment of all his property, it would defeat it.

So it is always advisable, that this person so put into possession should be a stranger; for to give the possession to one of the Party's own family, as to his Son, for example, so that things would appear to go on as before, is a very suspicious circumstance.

But a party who buys the Goods of a Defendant, and takes a Bill of Sale of them from the Sheriff, if he suffer the Defendant to continue in possession, that

(*u*) 2 Esp. Dig. N. P. 43.

(*x*) Twyne's Case, 3 Co. 80. Paget *v.* Perchard, 1 Esp. N. P. C. 205. Bamford *v.* Baron, 2 T. Rep. 594. in not. Edwards *v.* Harben, 2 T. Rep. 587.

is not fraudulent, nor will it defeat the right of the party to the Goods. If therefore the Party relies on that title, he should give in Evidence the Writ of *Fi. fa.* directed to the Sheriff, and produce the Bill of Sale, and prove his execution of it. (*y*)

Of the Evidence for the Defendant in cases of Bills of Sale, or such Securities.

Where Fraud is imputed in the possession of Goods, as set up to defeat the claims of *bonâ fide* Creditors, on the ground that they really belong to the person who has parted with the possession of them, the Evidence which the Defendant may bring forward to meet it must be attended to.

The Defendant may shew a settlement made before marriage of all his household and other effects, and that he has continued in consequence in possession; but that the effects were really at the time conveyed to Trustees, to whom, as Trustees, they belong. (*z*) To establish this he must produce his settlement, and prove the execution of it by the subscribing witness. He should also prove the time that the marriage took place; if the settlement was before marriage, it is a complete answer to any supposed Fraud. If it was after marriage, the Defendant must prove a portion paid in pursuance of prior ar-

(*y*) Kidd *v.* Rawlinson, 2 Bos. and Pull. 59. Watkins *v.* Birch, 4 Taunt. 823.

(*z*) Cadogan *v.* Kennet, Cowp. 432. Haslington *v.* Gill, cit. 3 T. Rep. 597.

ticles: for a voluntary settlement wanting that circumstance would be void as against Creditors. (*a*)

Questions respecting the property under *Bankruptcy* occur in this Action more frequently than in any other. The Evidence required in support of the Commission has been treated of before in the Chapter of Assumpsit, and what is necessary to be proved in cases in which the Assignees are Parties: but it should be observed, that with respect to the Plaintiffs there is a difference, where the Action is Assumpsit or Trover. It is said to have been decided, that if the Action is in Assumpsit, all the Assignees must join, and al be Plaintiffs on the Record, or they will be nonsuited: but that in Trover, it is not necessary that they should so join. (*b*) The Defendant may therefore in the former Action, by calling for the Proceedings, ascertain who are the actual Assignees under the Commission, and if they all are not Plaintiffs on the Record, nonsuit the Plaintiff: but such Evidence will be of no avail in Trover. But the question as to what is or is not to be taken to be property belonging to the Bankrupt's Estate, is here to be considered.

This question arises, for the most part, under the Stat. 21 Jac. I. c. 19., (*c*) whereby Goods and Chattels whereof the Bankrupt at the time of his Bankruptcy had the possession, order, or disposition by

(*a*) 2 Esp. Dig. N. P. 45. Prec. in Ch. 101, 426.
(*b*) Snellgrove *v.* Hunt, 1 Chitty's Rep. 71.
(*c*) 2 Esp. Dig. N. P. 72.

consent and permission of the true Owner, and had taken on himself the sole order and disposition as Owner, are declared by the Statute to belong to the Assignees, and be deemed part of the Bankrupt's Estate, that is, of which he was the visible owner.

This Action is, as far as respects the Statute, to try how far the Assignees are entitled to Goods and Chattels, which actually belong to other Persons, (*d*) but over which the Bankrupt having exercised a right of disposition, they are deemed to be his, and to pass to the Assignees.

When, therefore, the question arises between the Assignees and the real Owners of the property to which the former claim title; it is matter of Evidence with which the Assignees must be prepared; to shew what acts apparently of Ownership, the Bankrupt has done, or how the Goods have been under his care with an apparent power of disposition: as *e g*. if they made part of his Stock in Trade, or were sold in the course of it ; that can be proved by persons employed in his Shop or Warehouse, and clearly binds the property. So if the Bankrupt has mortgaged his Stock in Trade, and the Mortgagee has suffered him to remain in possession, (*e*) and he becomes Bankrupt; the Mortgagee has lost his title to it, by his having suffered the Bankrupt to keep the possession, and appear the owner, as before.

(*d*) Horn *v.* Barker, 9 East. 215. Longman *v.* Tripp, 2 Bos. and Pull. N. R. 67.

(*e*) Ryall *v.* Rolle, 1 Wils. 260. S. C. 1 Atk. 165.

What are the acts of apparent Ownership, or disposal of Goods, &c., exercised by the Bankrupt, which will entitle the Assignee to recover them, must necessarily be various, and not capable of enumeration: but, whether they come within the Stat. 21 Jac., is matter for the Court to decide; and numerous cases on that head will be found in the Elementary Books, but which do not belong to this Treatise, and the proofs must be settled accordingly.

Of the Evidence for the Defendant in such cases of Bankruptcy in Actions against the Owner.

It may be observed as a general matter of defence for the Defendant, that he must either shew that the Bankrupt had exercised no act of apparent ownership; or if he had, that it was consistent with his business or situation, that is, it should be shewn in Evidence, that the apparent possession of the Bankrupt was not such as the Statute contemplated, as that only furnishes matter of defence against the Assignees.

These matters of defence are several; as

1. The Defendant may shew, that although the Goods claimed made part of the Bankrupt's Stock in Trade, that he was a *Factor* only, (*f*) and had the Goods to sell for the Defendant (the Owner,) and whose property they were. In this case, the Defendant must give in Evidence, and prove the Goods to be his; that they were sent to the Bankrupt, as a Factor in

(*f*) 2 Esp. Dig. N. P. 77. Godfrey *v.* Furzo, 3 P. Wms. 185.

that way of Trade, for sale only. For that is not such an order or power of disposal as the law contemplates.

2. So he may shew that the Bankrupt had them on *sale and return;* (g) or that they were sent to him to select part, and to return what he did not approve of. (*h*) In those cases he must prove the circumstances under which he received the Goods, and which the Bankrupt may be called as a witness to prove.

3. He may shew that the Bankrupt obtained the Goods fraudulently or by false pretences, of which he must be prepared with Evidence to shew at the Trial. (*i*)

4. He may shew that his possession was for a particular purpose, from whence no credit was derived. As, where a Bankrupt was left in possession of his House and furniture to collect his debts, (*k*) or as under a Trustee on a settlement made before marriage. (*l*)

5. He may shew, that the Goods came to the Bankrupt in the character of an *Executor* (*m*) *or Adminis-*

(*g*) Livesay *v.* Hood, 2 Camp. 83.
(*h*) Gibson *v.* Bray, 8 Taunt. 76.
(*i*) Gladstone *v.* Hadwen, 1 M. and S. 517.
(*k*) Walker *v.* Burnell, Dougl. 303.
(*l*) Jarman *v.* Woolloton, 3 T. Rep. 618.
(*m*) Ex parte Marsh, 1 Atk. 158. Viner *v.* Cadell, 3 Esp. N. P. C. 88.

trator; in that case, he must give in Evidence the Probate of the Will, or letters of Administration to the person deceased, whose Goods he must prove those claimed by the Assignees to have been.

6. He may give in Evidence, (*n*) that the Goods were lodged with the Bankrupt only for a temporary purpose, as to be warehoused till they were shipped, (*o*) by shewing in Evidence, by a witness who knew the fact to be, that they were left with him for that purpose.

7. That the Bankrupt had been employed on the Goods with power only to work on them. (*p*)

2. *Of the Evidence for the Plaintiff in Trover, as it respects the person.*

It has been already observed, *ante* 418, that a special property in the Goods entitles the Plaintiff to maintain Trover. (*q*) But it should be observed that, property alone without *possession* of that for which the Action is brought, will not support the Action. (*r*) The Plaintiff's first piece of Evidence therefore in this Action must be proof of his possession; that is sufficient of itself against a Stranger. (*s*) But by

(*n*) 2 Esp. Dig. N. P. 74.
(*o*) Ex parte Flyn, 1 Atk. 185.
(*p*) Collins *v.* Forbes, 3 T. Rep. 316.
(*q*) Armory *v.* Delamirie, 1 Stra. 505. Rackham *v.* Jesup, 3 Wils. 332.
(*r*) Gordon *v.* Harper, 7 T. Rep. 9.
(*s*) Armory *v.* Delamirie, 1 Stra. 505. Rackham *v.* Jesup, 3 Wils. 332.

the term possession is not meant *actual possession,* it is sufficient if the Plaintiff had *a right of possession.* (*t*) But it must be a right of present possession, which the Plaintiff may immediately take if he pleases. (*u*) The principal cases which occur under these circumstances are,

1. *A Carrier* to whom the Goods of others are entrusted to be carried, if they are tortiously taken from him, may maintain this Action in his own name: (*x*) but he must prove that he is a Carrier, or entrusted to carry the Goods in question; and that they were taken by the Defendant, or got into his possession while they were in his custody; and a demand or refusal.

2. *The Sheriff* who has taken Goods under a *fieri facias,* if any person tortiously takes them away, may have Trover for them. (*y*) He must prove the Writ of *Fi. fa.* directed to him, by an examined copy of it; the making out of his Warrant to a particular Officer who seized the Goods, and was in possession when the Defendant either took them, or got possession of them, and refused to deliver them after demand.

3. *The Lord of the Manor* may have Trover for an *Estray* taken on his Manor; and that, during the year and day, against a Stranger who has wrong-

(*t*) Fluellin *v.* Rave, 1 Bulst. 68.
(*u*) Hanson *v.* Meyer, 6 East. 614.
(*x*) 2 Esp. Dig. N. P. 83. Wilbraham *v.* Snow, 1 Mod. 30.
(*y*) Wilbraham *v.* Snow, 1 Lev. 282.

fully possessed himself of it, and refused to deliver it up. But the Plaintiff must shew that he is Lord of the Manor, and that the animal came on the Manor as an estray; that as such, it had been taken and impounded, and was in his rightful possession when taken. (z)

4. *A Tenant* of an house, let with any moveables belonging to it, if it is blown down during the term, and a stranger takes away any of the moveables or timber which belong to the house, and refuses to redeliver them, may maintain Trover for them, though the ultimate property is in the reversioner. But he must shew, at the trial, that he was Tenant, and entitled to them; by what means the Defendant got possession of them; and a demand on him to restore them, and his refusal. (a)

5. In the cases now put the Plaintiff had a special property in the things: but possession alone is good against a mere stranger; as

A person who *finds* any thing by accident, acquires thereby such a property in it by reason of the possession, that if it is taken away from him by any one except the Owner, he can maintain Trover; for he thereby acquires a special property in it against all the world but the rightful Owner. (b)

(z) Sir W. Courtney's Case, Salk. MSS. Bull. N. P. 33.
(a) Bull. N. P. 33.
(b) Armory v. Delamirie, 1 Stra. 505.

So if a man even tortiously becomes possessed, as by having wrongfully cut property growing on a Common, yet he may maintain Trover for it against a stranger who has taken it away. (c) And in these cases last put, the Plaintiff may rely only on his having the possession; for, as against a stranger, he is never called upon to prove more than the possession of the goods: it is yet always advisable to be prepared in such cases with Evidence of the property, and to shew how it was acquired.

6. *Executors or Administrators* may maintain this Action for goods taken and converted in the lifetime of the Testator, (*d*) or in their own time. In which case, the Plaintiff must prove that the goods belonged to the Testator or Intestate; that the Defendant wrongfully became possessed of them; that a demand was made of them by the Testator in his lifetime, or by the Executor or Administrator after his death, and a refusal or non-delivery of them.

7. *Husband and Wife* may join in this Action for Goods which were the property of the Wife before marriage, and before that time came to the Defendant's possession, and which he refused to redeliver. (*e*) The Plaintiff in this case must prove their marriage, that the goods belonged to the Wife before marriage, and were in the Defendant's possession without any right to them, their being demanded, and refused.

(c) Rackham *v.* Jesup, 3 Wils. 332.

(*d*) 2 Esp. Dig. N. P. 83. Countess of Rutland *v.* Countess of Rutland, Cro. El. 377. Crossier *v.* Ogleby, 1 Stra. 60. Long *v.* Hebb, Style 341.

(e) Blackburn *v.* Greaves, 3 Lev. 107. 1 Vent. 260.

8. *A Pawnbroker* has also a special property in the goods taken by him in pawn, and may maintain Trover for them: but he may rely on his possession only, if they have been got into the hands of a stranger. If the owner has got them without redeeming them, the Pawnbroker may recover them in Trover, by giving in Evidence the fact of their being pawned, and the sum which he advanced on them; and he should give the Defendant notice to produce the ticket. So the Person who pawned them, if he has tendered the sum advanced, and the interest and expenses, if they are not given up, may maintain Trover for them; and this Action will lie as long as they remain unsold in the Pawnbroker's hands. For though by Stat. 40 Geo. III. ch. 99. s. 17. Goods pawned and not redeemed within a year are declared to be forfeited, and may be sold, this does not give to the Pawnbroker any property in the goods at the year's end; for if the owner of the goods after the year expires, and before they are sold, tenders the sum advanced on them and the interest, and the Pawnbroker refuses to deliver them up, he may maintain an Action of Trover for them. (*f*) In that case, the Plaintiff should produce the Pawnbroker's ticket which he gave to him, and which on proving the Defendant's hand-writing to it, establishes the goods pawned, and the money advanced on them. That sum and the interest on it from the time it was advanced, must be proved to have been tendered to the Defendant, by a witness who made it, on the part of the Plaintiff, who must then prove the demand of them

(*f*) Walter *v.* Smith, 5 Barn. and Ald. 439.

from the Defendant, and his refusal to deliver them up.

3. *Of the general points of Evidence required in all cases on the part of the Plaintiff.*

It has been observed, *ante*, page 418, that the Plaintiff is bound to prove,

1. Property, either actual or special.

Actual property is proved by Witnesses, who know the things for which the Action is brought to have been the Plaintiff's; as in Trover for an Horse, that the Plaintiff bred him, or has had him long, and used or rode him. This Evidence is rarely required, except where the property is contested by the Defendant, as in the case just mentioned, the Defendant may claim the Horse as his own, and give Evidence by marks or otherwise by Witnesses, that the Horse was his: in such case the Action turns solely on the property, as it is a question of Evidence for the jury.

Evidence as to special property has been already mentioned.

2. The Plaintiff must shew that the goods were, when taken, in his actual possession, or had been so previous to it; and that at the time, as well as when demanded, he had a right of actual possession; for a right of future possession will not support the Action. (g)

(g) Hanson *v.* Meyer, 6 East. 614.

Thus, if the Plaintiff's Horse had strayed and got into the Defendant's possession, who refused to deliver him; the Plaintiff, having an immediate right to the possession of his horse, may maintain Trover for him: and then by giving Evidence at the Trial, that he was possessed of the horse before he strayed; that the horse was found in the Defendant's possession, who refused to deliver him up on demand, the Plaintiff will have a Verdict.

But if the Plaintiff had hired out the horse to the Defendant, for a month, *e. g.* to do certain work, and before the month expired he demanded the horse, and being refused, brought an Action of Trover: he would not recover, for he had no right to the present possession of him.

3. The Plaintiff must prove the Defendant to have been in possession of the things for which the Action is brought, at the time they were demanded, or at some time previous to it; all which may be done by a Witness, who saw them in the Defendant's possession, or who knows of a previous delivery of them by the Plaintiff to the Defendant: but the Plaintiff is not required to shew *how* the Defendant became possessed of them, as he might have taken them tortiously; and though he may have done so, yet the Plaintiff may consider that he came by them lawfully, or by *finding*, in the words of the Declaration; and proceed for the conversion, after demanding them.

4. *The Plaintiff should, in every case where there*

has not been a wrongful taking before the Action brought, (*h*) *make a demand* of the Defendant to deliver to him those things for which the Action is brought, or to pay the value of them, or make satisfaction. (*i*) This may be either in writing, or by a Witness duly authorized by the Plaintiff, or by the Plaintiff himself. If it was in writing, the Plaintiff should keep a copy of the demand delivered to the Defendant, (*k*) and give notice to the Defendant to produce at the Trial that which was served upon him; and in case he does not, he must prove by a Witness that the copy of the demand produced was compared by him, and is a copy of that served on the Defendant.

A written demand of the goods, or the amount they were sold for, has been held to be a sufficient Demand; and being left at the Defendant's House is sufficient, for *a personal Demand is not necessary.* (*l*) This must be proved as before.

If the demand was made by a Person authorized by the Defendant to make it, that Person should be called to prove it; for the Defendant might have refused to deliver the goods, not knowing the authority of the Party who demanded them. (*m*)

If it was made by the Plaintiff himself, a Witness should be called at the Trial, who was present, and

(*h*) Nixon *v.* Jenkins, 2 H. Black. 135.
(*i*) Thompson *v.* Shirley, 1 Esp. N. P. C. 31.
(*k*) 2 Esp. Dig. N. P. 96.
(*l*) Logan *v.* Holditch, 1 Esp. N. P. C. 22. *Ibid.* 31.
(*m*) Solomons *v.* Dawes, 1 Esp. N. P. C. 83. Green *v.* Dunn, 3 Campb. 215. in not.

heard the Plaintiff make the demand on the Defendant.

But though I have laid down the Rule thus generally, and advise in every case a demand to be made, it applies to cases in which the Defendant came rightfully or innocently to the possession of the goods, in which case he is guilty of no wrong until he refuses to deliver them up to the owner. A demand is therefore necessary to be proved: but if in fact the Plaintiff can prove an actual tortious taking, (*m*) or an actual conversion of the goods, such as a sale of them to a third Person, that Evidence will be sufficient without proof of any demand. But to prove a tortious taking of the goods as by force, a Witness who saw the transaction can prove it; and if the Defendant sold the Plaintiff's goods, it is quite sufficient Evidence for the Plaintiff to call the Person who bought them, to prove it. But where the taking has not been tortious, the Defendant must prove, a demand, and refusal or actual conversion; a bare non-delivery of the goods will not support the Action. (*n*)

2. It is also laid down, *ante*, 418. as a settled principle of the Action of Trover, that the Plaintiff must prove *a conversion by the Defendant* of the things for which the Action is brought; and the words of the Declaration are "converted them to his own use:" and all the books speak of a demand and refusal as

(*m*) Tinkler *v.* Poole, 3 Wils. 146. Chapman *v.* Lambe, 2 Stra. 943.

(*n*) Ross *v.* Johnson, 5 Burr. 2825.

Evidence of that conversion. This requires explanation in settling the Evidence for the Plaintiff.

1. It is not necessary for the Plaintiff to shew *a refusal in terms by* the Defendant, to deliver the Goods. It is sufficient to prove a demand and an omission by the Defendant to deliver them before Action brought. An absolute refusal by the Defendant to deliver them is fully sufficient Evidence of a conversion: but the Defendant may assign a sufficient reason for not doing it, which will negative the conversion, as, *ex. gr.* that he keeps the Goods for the right owner, whom he does not know the Plaintiff to be. (*o*) So if he claims a *lien* on them, if it is a legal one, it is a good defence to the Action: but if the Plaintiff tender the amount of the lien or legal claim of the Defendant, which he refuses; if the sum tendered was sufficient, the Plaintiff will have a Verdict. In what cases the Defendant has a Lien. *Vid.* post, p. 446. In those, the question can arise only on the Tender being sufficient. The Tender must be clearly proved by the Plaintiff at the Trial; and if the Jury think it sufficient, the Plaintiff will have a Verdict: if they do not think it sufficient; as the right of Lien is admitted, the Verdict will be for the Defendant. The Plaintiff should therefore also be prepared to prove that the sum tendered was sufficient. So the Plaintiff might in such case go further, and prove that the Defendant absolutely disputed his

(*o*). Solomons *v.* Dawes, 1 Esp. N. P. C. 83. Green *v.* Dunn, 3 Camp. 215. 2 Esp. Dig. N. P. 96.

right to them: if he did, he cannot afterwards set up a Lien. (*q*)

It is not necessary for the Plaintiff to shew that he has absolutely *lost his Goods,* which the Defendant has taken; (*r*) the Defendant by wrongfully taking the Goods for a time, or partially using them, is guilty of a conversion *pro tanto;* as, *ex. gr.* if a man take another's horse, and ride him, though he afterwards brings him back, the owner may still maintain Trover, on proving at the trial such taking; and though he will not recover the value of the horse, he will recover damages for the use of him. (*s*) That must be proved by a Witness who knows of the horse being taken, and can speak to the length of time he was detained.

If a Person entrusted to carry a cask of liquor draws off part, and fills it up with water, it is a conversion of the whole, and may be so declared for; and, the fact being proved, the whole value of the cask may be recovered. (*t*)

So a delivery at a place, or to a Person contrary to the Owner's orders, is a conversion in the Person who has done it. So is a delivery to a wrong Person. (*u*)

(*q*) *Post*, 449.
(*r*) 2 Esp. Dig. N. P. 87.
(*s*) Per Popham, C. J. Golds. 155.
(*t*) Richardson *v.* Atkinson, 1 Stra. 576.
(*u*) Syeds *v.* Hay, 4 T. Rep. 260. Youl, *v.* Harbottle, Peake's N. P. C. 49.

So a misdelivery by a mistake has been held to be a conversion. (*x*) In this case and the preceding the Plaintiff must prove, what were the terms on which the Defendant had the goods, that is, what the actual orders of the Plaintiff were with respect to the disposal of them; as that a Carrier was ordered to deliver goods at one Inn, and he delivered them at another, and they were lost, that would be a conversion.

In settling the Evidence for the Plaintiff therefore, though a conversion is necessary to be proved, that means, not merely that the Defendant has taken the goods to his own use, but that the Plaintiff has lost the use of them by some act of the Defendant, such as in the cases last mentioned, in none of which the Defendant had the goods himself, nor derived any advantage from them: proof of that loss is sufficient Evidence for the Plaintiff to establish a conversion.

Of the General Evidence in this Action on the part of the Defendant.

The Evidence on the part of the Defendant is either a denial or disproval of the Plaintiff's right to maintain the Action, or the assertion of a right in himself to retain the things for which the Action is brought.

The only Plea in Trover is *Not Guilty*, under which the Defendant may go into any defence which he may have.

(*x*) Devereux *v.* Barclay, 2 Barn. and Ald. 702.

1. The Defendant may shew, that though the property of the goods is in the Plaintiff, he had *no right of present possession.* (*y*) As, *ex. gr.* if a Landlord had let a house ready furnished for a year, and before the expiration of the year brought Trover for the furniture, the Action would not lie. (*z*)

In that case, the Defendant should give in Evidence on what terms he had the goods, and thereby shew an existing right of possession in himself.

2. So he may give in Evidence a right of possession in himself. As in Trover for a gun, the Defendant may shew that he was Gamekeeper of a Manor, and seised the gun by virtue of the Stat. 22 & 23 Car. 2. So he may shew that he had taken the Goods in question as a Toll keeper for Toll. But in these cases he must give in Evidence, proof of being regularly appointed to the office, under which he acted. (*a*)

2. The Defendant may dispute *the property of the Plaintiff* in the Goods. (*b*)

As if Goods were *condemned in the Exchequer,* (*c*) the property is thereby completely divested out of the owner, so that he can maintain no Action: in such case, therefore, the Defendant must give in Evidence

(*y*) 2 Esp. Dig. N. P. 82.
(*z*) Gordon *v.* Harper, 7 T. Rep. 9.
(*a*) Bull. N. P. 48. Sir W. Jones, 240.
(*b*) Gordon *v.* Harper, 7 T. Rep. 9.
(*c*) Ekins *v.* Smith, Sir T. Ray. 336.

examined copies of the proceedings and Judgment in the Exchequer, by which it will appear, that the goods taken, were those for which the Action was brought, and that they were condemned.

So where an *exchange*, is made of horses, *ex. gr.* and possession given, neither party can maintain Trover for his horse, for the property is completely changed by the exchange and delivery: but both these facts must be proved at the Trial.

3. The Defendant may shew a property (*d*) in himself in the thing sued for, as *e. g.* That he became *possessed of it by legal transfer, or by a sale in market overt.*

As where a bank-note is lost, the owner may have Trover against the finder for it. (*e*) But if the finder had passed it to another in the course of dealing, in that case the latter would have obtained a clear title to it, and Trover could not be supported. But the Defendant would be bound to shew at the Trial, how he became possessed of it, and that he took it in the course of business, and gave for it a good consideration, or rather, was not himself the finder of it.

That is the case of negotiable securities, the property in which passes by indorsement or delivery: but in the case of Goods and Chattels, if the owner has lost them, and finds them in the possession of another, the latter must prove how he became pos-

(*d*) 2 Esp. Dig. N. P. 84. (*e*) Anon. 1 Salk. 126.

sessed of them. In such case, the Defendant may have purchased them ignorantly, and under the idea that they were the actual property of the Seller: but that gives him no title to withhold them from the real owner, unless the Sale has taken place in market-overt. (*f*) In such case the Plaintiff may support an Action of Trover by proving the Goods to be his: that they are in possession of the Defendant, and that he refuses to deliver them, relying on it that he bought them. But to make it a defence, he must prove the actual Sale, and where it took place; and that must be at a public Fair or Market, or at an open shop in London. If he has no such Evidence, he has no defence.

So the Defendant may shew property in himself by proving, that he was Joint Tenant or Tenant in Common with the Plaintiff; for one Joint Tenant or Tenant in Common cannot maintain Trover against the other, unless the latter has destroyed what was their common property. (*g*)

Under this head comes the case of a *donatio mortis causâ*. In an Action by an Executor or Administrator, for the thing so claimed, the Defendant must prove, that the gift of it was made by the deceased, but conditionally in case he recovered; that he delivered it into the possession of the Defendant, and that he afterwards died. (*h*)

(*f*) Hartop *v.* Hoare, 1 Wils. 8. S. C. 2 Stra. 1187.

(*g*) Brommell *v.* Jones, Selw. N. P. 1346. Barnardiston *v.* Chapman, cit. 4 East, 121.

(*h*) Walter *v.* Hodge, 2 Swanst. 92. 2 Esp. Dig. N. P. 83 & 93.

In the case of *sales of horses* there is some difference. If a horse were stolen, though selling him in market overt, might change the property, if all the requisites of stat. 2 Ph. and M. ch. 7. were complied with; yet, if sold by a false name, or not regularly booked, the property is not changed, the sale not being regular in market overt, the directions of the Statute not being complied with: (*i*) these are matters of parol Evidence.

3. The Defendant may justify the detention of the Goods, that is, a refusal to deliver them to the rightful owner on the ground that he has a *lien* on them for a demand of his own. (*k*)

This lien being either in consequence of an express contract between the Parties, or as arising from the usage of Trade; if the Defendant relies on it, he must, in the first place, establish by Evidence the existence of a lien, either by custom or contract; and, secondly, that the Goods came fairly into his possession in regular dealing; and, lastly, that he has a demand against the Plaintiff to a certain extent which attaches on the Defendant's Goods for which the Action is brought, that is, as connected with the nature of the demand, and therefore claims a right to retain them.

These matters are proved by Witnesses acquainted with the facts. An agreement for a lien, may be proved by one Witness: but the usage of trade or a particular business should be proved by more than one, if

(*i*) Gibb's case, 1 Leon. 158. (*k*) 2 Esp. Dig. N. P. 87.

possible; and that, by Persons who have known it acted upon, and not merely heard of it.

Liens have been recognized in the following businesses; and as they have been so settled by repeated decisions, there is no necessity in such cases for the Defendant to bring general Evidence of liens arising from such cases in these particular trades or businesses. The Defendant may rely on the decided usage: but observing, that in some there is a lien for a general balance, in others not.

1. In the case of Factors, they have a lien for a general balance. (*l*)

But the Defendant must prove, that the Goods were sent to him as a Factor; and that he had them as such in his possession when he claimed the lien. (*m*)

2. Bankers, for a general balance. (*n*)

3. Wharfingers, for a general balance. (*o*)

4. Manufacturers of different descriptions for the work done by themselves, as Dyers, Packers, Printers, for a general balance. (*p*)

(*l*) 2 Esp. Dig. N. P. 87. Krutzer *v.* Wilcox, cit. 2 Burr. 936. Drinkwater *v.* Goodwin, Cowp. 251.

(*m*) Kinloch *v.* Craig, 3 T. Rep. 783.

(*n*) 2 Burr. 936. Drinkwater *v.* Goodwin, Cowp. 251. 3 T. Rep. 783. Jourdaine *v.* Lefevre, 1 Esp. N. P. C. 66.

(*o*) Naylor *v.* Mangles, 1 Esp. N. P. C. 109.

(*p*) Green *v.* Farmer, 4 Burr. 2214. Kirkman *v.* Shawcross, 6 T. Rep. 14. Blake *v.* Nicholson, 3 M. and S. 167.

5. Pawnbrokers; for the advance on the Goods themselves. (*q*)

6. Innkeepers; while the Goods brought to their Inn remain with them: if they suffer them to go away, the lien is lost. (*r*)

7. Carriers; for the carriage of the particular Goods carried; not for a general demand or balance, unless an agreement or usage is strictly and fully proved. (*s*)

8. A Ship Carpenter; for Repairs done to a Ship. (*t*)

9. An Attorney; on all Deeds and Papers delivered to him by his Client in the course of business, or which have so come to his hands. (*u*)

And where an Attorney had been concerned for a Person before he became Bankrupt, and he was indebted to him for business done, and after the Party became Bankrupt, he had sued him for his debt and recovered, it was decided, that the Attorney had a Lien on Papers delivered to him by the Bankrupt before he became Bankrupt, not for the amount of his Bill

(*q*) Pre. Ch. 419. 2 Vern. 691. 1 Atk. 236.

(*r*) Robinson *v.* Walter, 3 Bulst. 268. York *v.* Grindstone, Salk. 388.

(*s*) Skinner *v.* Upshaw, 2 Ld. Ray. 752. Rushforth *v.* Hadfield, 6 East. 524. S. C. 7 East. 224.

(*t*) Franklin *v.* Hosier, 4 Barn. and Ald. 341.

(*u*) Welsh *v.* Hole, Doug. 226. Stevenson *v.* Blakelock, 1 M. and S. 535.

only, but for the Costs of the Action, though brought after his Bankruptcy. (x)

10. Brokers, who have given their Acceptances for Goods which they are afterwards to sell, have a Lien on the Goods to the extent of what they agreed to advance under their acceptance. (y)

When the Defendant relies upon a Lien, he must rely on it in the first instance. If he rests his refusal to deliver the Goods for which the Action is brought, on other grounds than that of a Lien, he cannot afterwards resort to his Lien as a justification for detaining them. The Plaintiff may therefore give Evidence, *e. g.* that the Defendant said he had bought the Goods which would be a waiver of the Lien. (z)

4. The Defendant, if he has rightfully come to the possession of the Goods, may shew that he was not guilty of such a conversion of them as is necessary to fix him in this Action. (a)

As where Goods of the Plaintiff were carried by the Servants of an Insurance Company to a warehouse, of which the Defendant, who was servant to the Company, kept the keys; and being applied to by the Plaintiff, said he would not deliver them up without an order from the Company; it was holden that he was

(x) Lambert *v.* Buckmaster, 2 Barn. and Cr. 616.
(y) Pulteney *v.* Keymer, 3 Esp. N. P. C. 182.
(z) White *v.* Gainer, 2 Bingh. 23. 1 Campb. 410 *in not.*
(a) 2 Esp. Dig. N. P. 86.

guilty of no conversion to his own use, (*b*) and that the Action could not be supported.

5. The Defendant may shew, in answer to the Plaintiff's case, that the Goods for which the Action was brought were *pawned* with him; (*c*) or that they were sold by him at the expiration of the year, not having been redeemed.

For this purpose he must give in Evidence that he advanced money to the Plaintiff, prove the delivery of the goods to him on those terms, and that he was to detain the Goods as a pledge till the money which he had advanced on them was repaid; and if they have been sold, to shew from the date of the duplicate, and the time of the actual sale, that a year has elapsed.

To these defences the Plaintiff may prove in reply, that the Goods pawned were stolen from him, and that he convicted the felon; for which purpose he must prove the record of the conviction of the felon for stealing them; and in the case of Parker *v*. Gillies, (*d*) the owner was allowed to recover his Goods against the Pawnbroker, they having been stolen from his house, and pawned by a Person who was tried for the felony, and acquitted on the absence of a material witness.

If the Pawnbroker relies on his having sold the

(*b*) Alexander *v*. Southey, 5 B. and A. 247.
(*c*) 2 Esp. Dig. N. P. 89.
(*d*) 2 Camp. N. P. C. 336 *in not*.

Goods as unredeemed pledges at the end of the year, the Plaintiff may prove by a witness that he tendered the sum for which the Goods were pawned before the year expired, with interest. Selling them after that is a conversion. (*e*)

6. It is no defence for the Defendant to shew that the Goods did not come to his own use: for if a servant, employed to receive Goods on his Master's account, disposes of them wrongfully, whether with or without his Master's orders, the latter will be liable in Trover for the amount. (*f*)

7. The Defendant may shew, that he had a joint property in the Goods, sought to be recovered in Trover; as before mentioned. (*g*)

As in the case of joint owners of a ship, which if one takes, and sends on a voyage against the consent of the others, he cannot maintain Trover for it: but if the ship is lost, then Trover will lie. (*h*)

8. The right of the Tenant to carry away the materials of any erections made by him on the Land or Premises occupied by him, on the expiration of his term, often raises an important question at Nisi Prius. Every erection fixed to the freehold *primâ facie* belongs to the Landlord, and he may maintain Trover

(*e*) Walter *v.* Smith, 5 Barn. and A. 439.
(*f*) 2 Esp. Dig. N. P. 92. Perkins *v.* Smith, 1 Wils. 328.
(*g*) Holliday *v.* Camsell, 1 T. R. 658.
(*h*) Co. Litt. 200.

for it if taken away: but as there are many things of that description, which the Tenant is warranted in taking away, he then should be prepared with Evidence accordingly.

This Tenant's right depends on the Custom of the Country, and on positive determination of Law. (*i*)

As if the custom of the Country is, that the Tenant of a Farm may, at the end of his Term, carry away, *e. g.* the timber of a Barn erected on blocks or timbers lying on the ground, that is a good custom: in such case the Defendant must call Witnesses to prove the established and received usage and custom of the Country, not from opinion or hearing only, but from having known it acted on; and then prove that the erection in question was within the usage. (*k*)

(*i*) 2 Esp. Dig. 100. (*k*) Bull. N. P. 34.

CHAPTER XIII.

OF SETTLING THE EVIDENCE IN THE ACTION OF TRESPASS ON THE CASE.

IN settling the Evidence in cases of Actions on the Case, which are more numerous than any other form of Action, this general Rule is to be observed, and which in some respect varies from the rules of Evidence in other Actions: that a less degree of strictness of proof is required: it being laid down as a rule, that material averments only are put in issue.(*a*)

It may be necessary to exemplify this rule by some examples, which in similar cases may be applied.

The Plaintiff declared in Case, for negligence of the Defendant, in running down his Boat *near* the Halfway Reach in the river Thames; the injury was proved to have been committed *in* the Halfway Reach. It was objected to as a variance, but was held not to be so; for the injury was the ground of Action; and

(*a*) Winn *v.* White, 2 Blackst. Rep. 840.

if *it* was proved, it was immaterial where it was committed. (*b*)

So where the Declaration stated an injury done to the Plaintiff's House, situate at *Sheerness*, in the county of Kent; and at the Trial it appeared that the House was situated at *Minster*, near Sheerness: it being an immaterial averment where the House stood, provided the injury stated in the Declaration was proved to have been committed, the variance was held not to be a good ground of nonsuit. (*c*)

But any variance in the Evidence of a material averment is fatal; and that is material, the injury to which is the Plaintiff's ground of complaint. As if the Plaintiff were to declare for a disturbance in a right of way across a certain close, called Home Mead, and in Evidence it appeared that the close over which he claimed a right of way was called Cow Meadow, and that Home Mead was a different close: as the Plaintiff claimed title to a right in the wrong close, his Evidence would not support it; and it being his title, it was a material averment, and the variance fatal.

The principal heads of injuries in this case are such as affect,—1. The Person.—2. Personal Property.—3. Real Property. And, lastly, Personal Rights.

(*b*) Drewry *v.* Twiss, 4 T. Rep. 558.
(*c*) Burbige *v.* Jakes, 1 Bos. and Pull. 225.

1. *Of the Evidence in Actions on the case for Injuries to the Person.*

1. If the Action is against a *Surgeon or Apothecary*, for an injury done to the Plaintiff's health, he must prove, that the Defendant was a Surgeon or Apothecary by profession: acted as such, and was paid or fee'd in that character: that he was employed by the Plaintiff to cure some wound or bodily injury or complaint. He must prove what the Defendant did in his attendance on him; and then call persons of medical skill and experience to give their Evidence and opinions, that the course followed was ignorant, improper, and unskilful; and that the want of cure of the Plaintiff's wound or malady was the effect of the ill treatment of it. The protracted illness of the Plaintiff: the expense incurred, &c.: are all matters capable of proof, and must be proved by witnesses.

2. A *Tavernkeeper, or Publican,* who sells bad Wine or Liquors to a Customer by which his health is affected, may be sued for damages in this Action. (*d*) In such case the Plaintiff must prove, that the Person who sold the Liquors was an Innkeeper, Tavernkeeper, or Publican, and that his House was open for that purpose: that the Plaintiff drank the Wine or Liquors furnished there to him by the Defendant; and then shew clearly that his illness proceeded from the use of them: this must be done by witnesses.

3. If a person keep a Dog used to bite, (*e*) or any

(*d*) 2 Esp. Dig. N. P. 108.
(*e*) 2 Esp. Dig. N. P. 109. Mason *v.* Keeling, 1 Ld. Raym. 606.

other vicious animal, as a Bull, &c., and the Plaintiff has been hurt by it, he may sustain an Action for the injury. In this case, it is indispensable to bring Evidence home to the Defendant, the Owner of the animal, that he *knew* that it was vicious, and kept it after notice. (*f*) That is matter of *vivâ voce* Evidence. And he must prove the Dog to be not only vicious, but the vice to be as he states it in his pleadings. As if the Action is for keeping a Dog used to *bite sheep,* if there is Evidence only of his having attacked and *bit men,* that will not support the Action. (*g*) In settling the Evidence, it must be seen that the proofs correspond with the averment in the Declaration. The Defendant may defend himself by shewing that the Dog or Bull were kept in proper places; the Dog, for defence of his Premises, and the Bull in a Close; and that the hurt the Plaintiff received proceeded from his going into either place where he had no business. (*h*)

4. And where the Action is for a Personal Injury, it will be good Evidence for the Defendant to shew, that it arose from the misconduct or negligence of the Plaintiff himself: as when it was for an injury received from a spring gun set in the Defendant wood, and of which he had put up a notice, the Action was held not to lie; for the Plaintiff when he received the injury was a Trespasser. (*i*)

5. Another Action of this description arising from

(*f*) Beck and Wife *v.* Dyson, 4 Camph. 198.
(*g* Hartley *v.* Harriman, 1 Barn. and Ald. 620.
(*h*) Brock *v.* Copeland, 1 Esp. N. P. C. 203.
(*i*) Ilott *v.* Wilkes, 3 Barn. and Ald. 304.

any injury which a Party may sustain, either in his Person or Property, is that arising from *the negligent driving of a Carriage, or steering of a Ship* by the Defendant or his servants. The Plaintiff's evidence must substantiate the facts of the injury, and state precisely how it happened. The Defendant must rest his defence on this, either that it proceeded from inevitable accident, or from the Plaintiff's own neglect or fault. If, for an injury done to Plaintiff's ship, the Defendant can prove that his vessel was driven against the Plaintiff by a tempest, it would excuse him. So if the Horses of the Defendant's carriage were frightened, became ungovernable, and ran away, and injured the Plaintiff's carriage, that Evidence is sufficient: in the latter case, the usual defence is, that the Defendant was on the right side of the road when the accident happened, which arose from the Plaintiff's own fault: but what is called the law of the road is not inflexible; a deviation is in some cases not only justifiable, but necessary. (*i*) For though a Party may be driving on the wrong side of the road, if he leaves sufficient room to pass on the other, he can recover. (*k*)

2. *Of the Evidence in cases of Injury to Personal Property, by Officers or private Persons.*

First by Officers:

1. Trespass against the Sheriff being to recover damages, by reason of some neglect or misconduct of

(*i*) Wade *v.* Lady Carr, 2 Dowl. and Ry. 255.
(*k*) Clay *v.* Wood, 5 Esp. 44.

his, in not executing process directed to him, or doing it improperly, or making false returns respecting it, and as those cases of misconduct are not his own, but of his Officers, it should be observed as a general rule; that he being by law answerable for the acts of his Officers; where he is sued for any act of theirs, and his name only appears on the Record, the Officer who did the wrong must be connected with the Sheriff, by shewing the Sheriff's Warrant directed to him to act. (*l*)

The name of the Officer who executed the Process, or rather to whom the Warrant was directed, is had at the Sheriff's Office. If the Writ is in the Sheriff's Office, the under Sheriff must be subpœnaed with a *duces tecum* of the Writ, and he must be required to state to which of his Officers a Warrant was made out. If the Warrant has been returned to the Sheriff's Office, it should be included in the *duces tecum*: if not, the Officer should be subpœnaed with a *duces tecum* of the warrant; and the misconduct, which is the ground of the Action, must be brought home to him. It is usual in the Sheriff's Office, to indorse on each Writ the name of the Officer to whom the Warrant was made out; and the under Sheriff will inform the Party to what Officer the Warrant was given. And in one case, it was held that the name of the Officer, being found written on the examined copy of the Writ and return, was sufficient to connect him with the Sheriff. (*m*) But that has been over-ruled since,

(*l*) See *ante*, 329.

(*m*) M'Neill *v.* Perchard, 1 Esp. N. P. C. 263.

as not of itself sufficient; the writing must be of some persons in the Office: but where in addition to it was proved that the Sheriff's Officer had written a letter to him desiring a return, it was held sufficient. (*n*) The best mode is, however, that above mentioned; and it is indispensable to connect the Sheriff with the Officer.

Having observed that precaution in settling the Evidence in every case, the principal heads of Action in this case are,—1. Against the Sheriff for Escapes.—2. For informal Executions.—3. For false Returns.

In the case of *Escapes,* the Evidence required, in Debt for an Escape where the Defendant is in custody on final Process, has been already given (pag. 207.) The case of an Escape to be treated of here, is, where there has been an *Escape on mesne Process,* in which case the damages are uncertain.

In that case, the Plaintiff must prove the regular averments in his Declaration. The first is, that the Defendant in the original Action "being indebted to him in a large sum of money, for the recovery of it, he sued out a Writ of," &c. The Plaintiff must, therefore, first prove, that he was so indebted: it is not necessary to state on what account he was indebted, as for goods sold, &c.: but if he does, he must prove it. So he need not say, that the Defendant was held to bail by virtue of an Affidavit: if he does, he must prove it. This may be done by an Office Copy

(*n*) Jones *v.* Wood and Others, 3 Camp. 229.

of the Affidavit. (o) The suing out of the Writ, may be proved either by the production of the Writ itself, or of an examined copy from the Treasury when returned. If *Non est inventus* is returned, when in fact the Defendant in that Action was arrested, there are two Counts always laid in the Declaration, the one for an Escape, the other for a false Return; and where that is so, the Plaintiff, to fix the Sheriff, must shew that a Warrant was made out by the Sheriff to one of his Officers; that that Officer was seen to arrest, or have the Defendant in his actual custody; and that he was afterwards seen at large.

But the mere fact of the Defendant in that Action being seen at large, will not subject the Sheriff to an Action for an Escape, as he is bound, if sufficient Bail is offered, to let the Defendant in the Action remain at large until the return of the Writ. The Plaintiff must therefore wait until the return of the Writ; and if no Bail Bond has been taken, or Bail above put in, or the Defendant in that Action surrendered, or in the Sheriff's custody, the Action will lie. In settling the Evidence, therefore, it will be necessary to ascertain if any of these matters have taken place; and, if they have, the Action will not lie.

But although it is indispensable for the Plaintiff, if he goes for an Escape, to prove that the Defendant in the original Action was in the custody of the Officer, who had the Writ against him, and to whom the Warrant was directed; it may however be done, not by the *vivâ voce* Evidence before stated, but by

(o) 2 Moore 60.

the production of the Writ, and shewing on it the Sheriff's return of *Cepi corpus;* for that admits that a caption did take place; and then the Escape may be proved, by giving Evidence, that the Defendant was neither in actual custody of the Sheriff at the time of the return, nor that any Bail above was put in for him. (*p*)

If the Defendant was seen openly and at large after the delivery of the Writ to the Sheriff, and a Warrant granted on it, and no actual arrest took place by that Officer; an Action for *an Escape* will not lie: the form of Action then is, *Case against the Sheriff for negligence in not arresting the Defendant.* But, to subject the Sheriff in that case, Evidence must be given by the Plaintiff, that he informed the Sheriff's Officer where the Defendant could be found, or pointed him out to him, notwithstanding which he neglected to make his caption. (*q*) But such notice given to the under Sheriff's agent in town, that the Defendant in the Action was then within the Sheriff's bailiwick, is not sufficient to charge the Sheriff. (*r*) And in such Action the Plaintiff must give Evidence to establish a demand against the Defendant in the original Action, as he would be required to do in that Action itself.

In these Actions, the Sheriff being the nominal Defendant, the Officer who committed the fault being

(*p*) Fairlie *v.* Birch, *et al.* 3 Camp. 397.
(*q*) Beckford *v.* Montague, 2 Esp. N. P. C. 475.
(*r*) Gibbon *v.* Coggon, 2 Camp. 188.

the real one, though he may be called by the Plaintiff; he cannot be a witness for the Defendant, the Sheriff, as he is liable over to him: but the Sheriff may release him, and that will make him a good witness. But his *Assistant* may be a good witness for the Sheriff, without any release, either from the Sheriff, or the Officer to whom he was assistant. (*s*)

The Evidence for the Defendant, the Sheriff, in this particular case, should be attended to.

What has been just now stated, on being given in Evidence by the Sheriff, is a matter of defence for him, that is, that the Defendant is in actual custody, or surrendered, or that Bail above has been put in.

But he may give other matters in Evidence—as, he may shew that the Defendant in that Action, when in custody on mesne Process, was *rescued*; (*t*) or, that he rescued himself *by force*. (*u*) This must be circumstantially proved by a witness who saw the circumstances, and can prove the violence used to the Officer, in consequence of which he was forced to give up the Person arrested; for the making a return of a rescue is not conclusive for the Sheriff. (*x*)

It is no defence for the Sheriff, that he arrested the Defendant irregularly; as where he arrested him

(*s*) Clark *v.* Lucas, Ryan and M. 32.
(*t*). May *v.* Proby, Cro. Jac. 419.
(*u*) Fermor *v.* Phillips, Holt 537.
(*x*) Adey *v.* Bridges, 2 Stark. 189.

within a Liberty, when there was not a *Non omittas* clause in the Writ, and the mayor claimed the exclusive privilege of executing process ; this was held to afford no excuse to the Sheriff; for having once arrested him, he was bound to keep him. (*y*)

2. Another ground of this Action, against the Sheriff, is for some irregularity in executing a Writ of *Fi. fa.* This may be by the Landlord of the Defendant in the original Action; (*z*) where the Sheriff *has neglected to reserve a year's rent,* he having had notice that so much was in arrear to him. For that purpose he should shew, that the Defendant in the Action was his Tenant; that there was so much rent in arrear; that he gave notice to that effect to the Sheriff. This last should be proved by a written notice served on the Sheriff, which he should have notice to produce; and a witness should then prove a copy compared with that which was served, and then prove the sale of the effects by the Sheriff.

But though what has been just stated is the regular and safe course for the Landlord to pursue; yet if he has neglected to do it, and can prove that the Sheriff knew that rent was due to the Landlord, and did not retain it, he is liable to this Action; for no specific notice is required; that must be Evidence from facts, established by witnesses; and the execution being conducted with secrecy and haste, was held to fix him with sufficient notice. (*a*)

(*y*) Piggott *v* Wilkes, 3 Barn. and Ald. 502.
(*z*) Stat. 8 Ann. c. 14. Palsgrave *v.* Windham, 1 Stra. 212.
(*a*) Andrews *v.* Dixon, 3 Barn. and Ald. 645.

And as the goods are liable in the Sheriff's hands until they are actually sold, if the Plaintiff can prove, that although the goods were removed, he received notice from the Landlord, before the sale, the Sheriff will be bound to pay, and the Plaintiff will recover.(b)

So the Sheriff may be liable in this Action, at the suit of the Defendant, for misconduct in the sale of his effects, and for not returning to him the overplus after all due allowances. (c)

As if he sold effects of the Defendant for 5*l.* which the Defendant proves were worth a much larger sum, or in an improper way. If the Party prove these facts by witnesses, the Sheriff will be liable. So if he charge any deductions; as for rent paid to the Landlord: he must prove the payment, and the Landlord cannot be a witness to prove it. He is, therefore, bound to prove the tenancy and rent in arrear.

3. So if the Sheriff *executes first a Writ delivered to him subsequent to one before in his hands,* he will be liable in this Action. (d) In that case, the Plaintiff must prove the first Writ by production of it, or by an examined copy if returned. He must also shew the time when it was delivered to the Sheriff. He must then give in Evidence, that there were Goods of the Defendant's on the Premises when he delivered

(b) Arnitt *v.* Garnett, 3 Barn. and Ald. 440.
(c) Ditcham *v.* Bond, 3 Campb. 524.
(d) Smallcomb *v.* Buckingham, Salk. 320.

the Writ to the Sheriff, and which he either has not levied on, or returned *nulla bona* to the Writ of *Fi. fa.* so first delivered to him.

This question is raised in an Action against the Sheriff for a *false return;* therefore, where he has returned *nulla bona*, the Plaintiff, by giving the Evidence just mentioned, falsifies the return. (*e*)

This question frequently occurs in the case of an Extent at the suit of the Crown. For if an Extent is delivered to the Sheriff against the Goods of any Person which he has taken in execution, but not actually sold; the Extent is to have the priority. (*f*) If, therefore, an Action is brought against the Sheriff for returning *nulla bona* under such circumstances, he must give in Evidence the Writ of Extent, and prove the time of the delivery of it to him; and then give in Evidence, that though he was then in possession of the Defendant's Goods, they were not actually sold at the time: for until an actual sale, the property in them is considered as not altered, so as to affect the prior claim of the Crown; and that, even though the Crown process bore *teste* after the execution and seizure by the Sheriff.

Under this head, questions of property in Goods taken are tried; for as the Sheriff is liable in Trespass for levying under the *Fi. fa.* on Goods which are not the property of the Defendant in the Action, and that

(*e*) Bradley *v.* Wyndham, 1 Wils. 44.

(*f*) Rex *v.* Sloper, 6 Pr. 114.

property is often doubtful; if he is either indemnified, or takes upon himself to decide between two claimants, in whom the actual property is, and makes his return accordingly, and the other Party chooses to contest it, he does it in an Action for a false return. In that case, the whole of the case will depend on proof of actual property, which is matter of fact to whom the Goods really belong, and must be established by witnesses.

2. For any breach or neglect of his duty, this Action lies against an *Attorney*. (*g*)

As, *ex. gr.* if the Attorney neglects to charge a Defendant in execution in due time, by reason of which he is superseded, (*h*) the Action will lie against the Attorney for his neglect. The Evidence in that case would be; the retainer of the Defendant as the Plaintiff's Attorney; that the Defendant in the original Action had been arrested or taken in execution at his suit, and committed to Prison: this is proved by the books from the Fleet, the King's Bench, or other Prison where the Defendant was in custody; by that Evidence also the actual time of his committal will appear. The Officers from the same Prison will produce the supersedeas, or order for his discharge, which will also shew the grounds of it, that is in the present case, by reason of the Defendant not being charged in execution within three Terms

(*g*) 2 Esp. Dig. N. P. 123.

(*h*) Russel *v.* Palmer, 2 Wils. 325. Pitt *v.* Yalden, 4 Burr. 2060.

according to the practice of the Court. If the Plaintiff has suffered from the discharge of the Defendant in losing his Debt, and it is so laid in the Declaration, he may give that in Evidence of his damages.

As the ground however of the Plaintiff's recovery is the injury which he sustains, by means of the Attorney's neglect, the Attorney may shew, that the Plaintiff could not have been benefited. As if he complained that the Attorney had suffered a Person to be superseded whom he had sued for a debt; the Attorney might shew that the Plaintiff could never have recovered any debt against the Defendant, as she was a married woman that he must give in Evidence. (*i*)

So if it was against an Attorney employed to sue an Officer for a supposed illegal seizure of goods, the Attorney may shew that the seizure was lawful. (*k*)

He may also shew that the proceeding, for the neglect of taking which he was sued, was not a *bonâ fide* one; as where it was *for delay* only. (*l*)

The Evidence must necessarily vary, according to the different cases of neglect by the Attorney, and be settled accordingly. As if, in a purchase, the Attorney takes upon himself to decide upon the validity of the title, and it turns out to be bad, or neglects to do what is necessary to complete it, in consequence of

(*i*) Lee *v.* Ayrton, Peake N. P. C. 119.
(*k*) Aitcheson *v.* Madock, Peake 162.
(*l*) Johnston *v.* Alston, 1 Campb. 176.

which his client loses his money, the Attorney will be liable: in that case, the Plaintiff must prove that he employed the Defendant; that he prepared the conveyances, which must be produced and proved. On proving the Party's handwriting to the receipt, the receipt on the back, proves the payment of the money. He must then prove, that he lost the benefit of his purchase; if of Lands or Tenements, by shewing a recovery against him, or eviction, by a Person having title, as, *ex. gr.* a judgment in Ejectment, against him, which should be produced and proved. If the neglect was of something necessary to complete the conveyance; as neglecting to have a proper memorial of an annuity by reason of which the Court set it aside; the rule of Court so ordering it should be produced, and also an examined copy from the Office of the Clerk of the Rules, which states the ground of objection to the validity of the annuity, by reason of which it was set aside.

And to prove those acts of negligence, the Parties to the transactions in which the negligence or misconduct took place are good witnesses. (*m*)

3. *Justices of Peace* are liable in this Action for any breaches of their duty by which a Party suffers; (*n*) as if he refuses Bail when offered, and where it ought to be taken. In such case, the offence for which the Party was in custody, is proved by a

(*m*) Hunter *v.* King, 4 Barn. and Ald. 209.
(*n*) 2 Esp. Dig. N. P. 124.

copy of the committal to Prison; and then the offer to him of Bail must be proved by the Person who made it.

It has been before observed, (*o*) that where a conviction of a Justice has been quashed, and he being liable in damages for any injury which the Party has suffered in consequence of it, by stat. 43 Geo. III. c. 141. the form of Action must be Case. Where it is so brought, to support the Action, the Plaintiff must prove express malice in the Defendant; and that there was no reasonable or probable ground for convicting him. The first may be established by the Plaintiff proving oppressive acts done to him by the Justice; declarations of enmity to the Plaintiff made by him to others. On the other hand the Justice may shew that he had good ground for his Proceedings, by calling the witnesses, on whose testimony he was convicted, and so rebut the presumption of malice.

4. Actions against *Carriers,* for negligence, are brought in this form of Action, though they may also be sued in Assumpsit.

These may be considered, 1st, As for Injuries to the Person; and, 2d, To Goods or other Property.

1. Injuries to the Person are those which Passengers by Stage Coaches, or other conveyances, receive from some fault in the driver or conductor of them.

(*o*) *Vid.* Ch. of Trespass, p. 282.

In settling the Evidence for the Plaintiff, he must prove that the Injury which he received arose from the ignorance, negligence, or carelessness, of the Defendant, or his servants ; for he is answerable in this Action for such faults of his servants : but the Injury must have arisen from some one of these causes; for they do not insure the Persons of their Passengers against accidental injuries proceeding from no fault of theirs, as when the horses took fright, and ran away with the carriage. (*p*)

The usual Cases in which these Actions are brought, are where the Carriage has been overturned, and a Passenger received an injury from being thrown on the ground. In his Evidence the Plaintiff is bound to prove the cause, or the probable cause, of the Carriage being overturned : as, *e. g.*, that the wheel came off: the reins broke: the horses restive, not being well broke in : the coachman drunk, or having left his horses. All these are acts of negligence and misconduct in the owner, in not providing a proper and safe carriage ; sufficient harness, and a careful driver. The facts of the injury happening, are to be proved by Persons who were present, and who should be called : the extent of the injury, by the Surgeon, who can speak to the effects of the accident, and the amount of his charges : these are always laid in the Declaration, as well as any special damage, such as the loss of business, &c. all of which are the subject of *vivâ voce* Evidence.

It may be useful, in settling the Evidence, to attend

(*p*) Aston *v.* Heaven, 2 Esp. 533. Christie *v.* Griggs, 2 Campb. 79.

to two points that have been ruled. 1. That the breaking down or overturning of a Stage Coach, is *primâ facie Evidence* of negligence in the owner; (*q*) and, secondly, That if it is overloaded with Passengers, and overturned, it is *conclusive Evidence* of negligence against him. (*r*)

2. Of Injuries to Goods or Property.

Carriers being liable for the loss of all Goods entrusted to be carried by them, (*s*) unless the loss has happened from the act of God, or the King's enemies: from the default of the Party sending them: or by reason of a notice given by the Carrier of his non-responsibility under particular circumstances; in all cases, the Plaintiff must prove, that the Defendant was a common Carrier, either by land or water, announcing himself to the world as such, or that he expressly undertook to carry the things for hire: (*t*) these facts are matter of parol Evidence. He must next prove the delivery of the things lost, to the Carrier, either in Person, or to the servant regularly employed by him in the business, or at the House, Inn, or Wharf, where he was in the habit of receiving Goods, or where he advertised or notified that Goods were to be left or received. (*u*) This must be done by the witness who left them or delivered them; and he must say where

(*q*) Christie *v.* Griggs, 2 Campb. 72.

(*r*) Israel *v.* Clark and Clinch, 4 Esp. 259.

(*s*) 2 Esp. Dig. N. P. 125.

(*t*) Garside *v.* Propr. of the Trent Navig., 4 T. Rep. 581. Dale *v.* Hall, 1 Wils. 281.

(*u*) Edwards *v.* Sherratt, 1 East. 604.

he delivered them: if he got a receipt for them, he should produce and prove it; and if they were entered in a book kept by the Carrier, notice should be given to produce it. The Plaintiff must next prove, how the Goods were directed, and that they had not been received, or were lost; and, lastly, their value.

The defence for the Defendant must be on one of the grounds of exemption above stated. (*x*)

Thus, if Goods were sent by an Hoy, and she was sunk in a sudden squall of wind, that is the *act of God;* and excuses the carrier. The Law is the same if the Hoy man were obliged to throw some Goods overboard to lighten the vessel, or to save the passengers in a storm. (*y*)

So if Goods were set on fire by lightning, it would be deemed the act of God: but, in case of Goods being consumed by fire, the Defendant must prove the fire to have proceeded from that cause. (*z*)

To exempt the carrier from liability, by reason of the Goods being taken from him by an armed force, they must be foreign enemies: not Rioters or River Pirates. (*a*)

It should, therefore, be shewn of what description the Persons were.

(*x*) Amies *v.* Stephens, 1 Stra. 128.
(*y*) 1 Roll. Ab. 79.
(*z*) Forward *v.* Pittard, 1 T. Rep. 27.
(*a*) Morse *v.* Sluce, 1 Vent. 190. Forward *v.* Pittard, 1 T. Rep. 27.

So the *misconduct of the Owner* may exempt the Carrier from being liable, as if a Person will force his Goods on the carrier when his waggon or vessel is otherwise full; or puts his Goods into improper packages, and they are lost or damaged, the carrier is not liable. When, therefore, this is the case, the Defendant should be prepared with Evidence to that effect, (*b*) to meet the Evidence of the loss.

The general and most usual defence is, that the carriers have given *a notice* to all persons sending Goods by them, that they would not be answerable beyond a certain sum, or for a certain description of Goods, unless they were specifically paid for the carriage of them: (*c*) this must be notified in the most public manner, and be proved by the Defendant. (*d*) A great variety of decisions have taken place upon this point. (*e*) It is now held, that there must be that specific notification made to every Person sending Goods: and that the putting up a large board to that effect in the Coach-office is not sufficient notice, unless knowledge was brought home to the Person sending the Goods lost. (*f*) Therefore a notice at the beginning or end of a journey will not exempt the Carrier, when the Goods have been taken up in the middle of it. (*g*) When there is such a notice, proof

(*b*) 2 Esp. Dig. N. P. 126. Lovett *v.* Hobbs, 2 Show. 127.

(*c*) Clay *v.* Willan, 1 H. B. 298. Izett *v.* Mountain, 4 East, 371.

(*d*) Clayton *v.* Hunt, 3 Campb. 27.

(*e*) *Vide* 2 Esp. Dig. N. P. 128.

(*f*) Kerr *v.* Willan, 2 Stark. 53. Leeson *v.* Holt, 1 Stark. 186.

(*g*) Gouger *v.* Jolly, Holt, N. P. C. 317.

by the Defendant that he was robbed of the Goods is within the notice. (*g*)

So held by Abbott, Ch. Just., at G. Hall, Sitt. after Trin. T., 1819. ——— *v.* Waterhouse.

In settling the Evidence for the Defendant in this case, great attention must be applied, to fix the Plaintiff with knowledge of his having limited his liability, by giving notice that he would not be answerable, but to a certain extent. Such as by advertising in a Newspaper: by hand Bills: Bills posted up in the town or street where the Plaintiff resides, any of which he has been seen to read: by a verbal communication to him to that effect, at any time, or in any other way. If the Defendant fails in doing this, which is to be proved by Witnesses, his common law liability attaches on him to the full extent of the loss. He may also shew an unfair concealment by the Plaintiff himself of the value of the Goods or Parcel sent; as where the Plaintiff sent a parcel containing notes to the amount of 4000*l.*, without any intimation of their value to the Carrier, and it was lost, it was left to the Jury to say, whether the Plaintiff had not been guilty of an unfair concealment; and they having found that there was, it was held that the Plaintiff could not recover. (*h*)

But although the Carrier does put out such a no-

(*g*) Corrington *v.* Willan, 1 Gow. 115.
(*h*) Batson *v.* Donovan, 4 Barn. and Ald. 21.

tice, he is still liable for the loss, if he has been guilty of gross negligence: and that is a fact to be established by proof of the way in which the loss happened.

And those things have been held instances of gross neglect, where the Box was delivered to a wrong person. (*i*) So where but one Porter was sent out to deliver the Parcels from a Cart, as there should be two, for one must necessarily leave the cart unguarded. (*k*)

If Goods are booked to be sent by one Coach, and they are sent by another, and lost, the Carrier is liable: but the owner must prove by what Coach they were booked, and prove that they were sent by another. (*l*)

5. *Pawnbrokers, or Persons who take Goods in pledge*, are also subject to this Action for any misconduct respecting them, as for losing them or not returning them on demand; it being the nature of the contract, that, on repayment of the sum advanced on them, the Goods are to be restored. (*m*)

Where this is the case, the Plaintiff has only to give Evidence of the pawning: that is done, by producing the Pawnbroker's Ticket, and proving it to be in his handwriting, or that of his clerk, who should

(*i*) Birkett *v.* Willan, 2 Barn. and Ald. 356.

(*k*) Smith *v.* Horne, 2 Moore 18.

(*l*) Sleat *v.* Tagg, 5 Barn. and Ald. 342. Garnett *v.* Willan, 5 Barn. and Ald. 53.

(*m*) 2 Esp. Dig. N. P. 132.

be called as a Witness, if there be any doubt of his being so employed. If the Person is not a Pawnbroker, but has had the Goods on pledge, the delivery of them on those terms to the Defendant must be proved: the Plaintiff must next prove the value of them; and, lastly, a tender of the money advanced on the pledge, and a demand of the Goods. This Evidence, on the part of the Plaintiff, must be given; and may be done by the Witness who did it.

The Defendant may give in Evidence that the Goods were stolen from him, though he otherwise took due care of them: but this would be no answer, if the Plaintiff had previously tendered the sum advanced on them.

6. Another case in this Action, is where *Goods have been delivered to another to be kept or hired, or been lent*, and they are lost. (*n*)

In these cases, the Person who has had them so delivered to him, is only liable where such neglect is imputable to him, as occasions the loss; and the Plaintiff must always be prepared with Evidence to shew that there was gross neglect, or an user of the thing lent, in a manner different from the purpose for which the owner lent it. (*o*)

Thus, for example, if Goods are delivered by a Person to be put on board a ship, and defective tackle is used

(*n*) 2 Esp. N. P. 132.
(*o*) Goswill *v.* Dunkley, 1 Stra. 680.

which breaks and the Goods fall into the water and are lost, the party is answerable; for it was gross neglect in him not to have good and sufficient tackle. (*p*)

So if one lends a Horse to go one journey, and the party to whom he has lent him takes him another, and the Horse is lost or dies, the party is liable to whom he was lent. (*q*)

Where Goods or other property is delivered on *a loan* or let out *to hire,* and lost, the Rule to be observed is this; that proof of positive negligence or misconduct is necessary in all cases, or the Plaintiff cannot recover.

As if a Horse is let to a Party for a journey, and during it receives an injury, the hirer is not liable, unless the owner can prove positive negligence. (*r*) But if the Horse were taken ill, and the hirer, in place of sending for a farrier, gave improper medicines to the Horse, and he died; the hirer would be liable for the loss of him, for that was negligence and misconduct.(*s*) But in both cases the Plaintiff must give the facts in Evidence, as in the first place prove that the Horse was over-ridden; not kept shod, or the like: and in the second, prove what medicines were given to the Horse, that the hirer administered them himself, and that they were improper.

(*p*) Thomas *v.* Day, 4 Esp. N. P. C. 262.
(*q*) Com. Rep. 136.
(*r*) Cooper *v.* Barton, 3 Campb. 5. *in not.*
(*s*) Dean *v.* Keate, 3 Campb. 4.

Such also is the case of Persons who receive Goods to be *warehoused*, or taken care of, and for which they receive certain rent, reward or hire, they are liable in case of gross negligence only; and not so, where they take the common and usual care, as where Goods lodged in a warehouse had been much injured by rats, notwithstanding every degree of care taken to destroy them, the warehouseman was held not to be liable. (*t*)

So when they were stolen, by the servants of the Person to whom they were delivered. (*u*)

So if a Farmer takes in Horses to agist, if any are lost, to charge him with the loss, negligence on his part must be shewn, such as leaving his gates unlocked, and the like. (*x*)

This must, therefore, be attended to carefully in settling the Plaintiff's Evidence. The Defendant should at the same time be prepared with Evidence at the Trial, to shew that he had taken due care of what was entrusted to him. This is best proved by his own servants, for whom he is answerable. (*y*)—But the Plaintiff must, in every case, give in Evidence the delivery of the Goods to the Defendant, and his acceptance of them; for, unless fully delivered, and in the usual way; the Defendant will not be liable,

(*t*) Califf *v.* Danvers, Peake 114.
(*u*) Finucane *v.* Small, 1 Esp. N. P. C. 315.
(*x*) Broadwater *v.* Blot, Holt. N. P. C. 547.
(*y*) Gibson *v.* Inglis, 4 Campb. 72.

as a delivery at a wharf to an unknown Person was held to be a bad delivery. (z)

7. Actions against *Innkeepers*, to recover the value of things lost by Persons in their Inns, forms another head of this Action. (*a*)

To entitle the Plaintiff to recover damages in that Action, he must prove, 1st, That he was a *Guest*, and using the Inn as such, and had been so received. (*b*) 2. That the House was a common Inn for the reception of travellers, kept by the Defendant: as to which, that is not to be taken as an Inn only, which is used in common acceptation, where coaches set up, and stables are kept for Travellers' Horses, for a House of public entertainment in London, where provisions and beds are furnished for all persons applying and paying for the same, having no stables attached to it, nor frequented by waggons or coaches, and going by the name of a Tavern or Coffee House, is deemed an Inn, so as to subject the keeper of it to all the liabilities by law incident to the business of an Innkeeper. (*c*) 3. That the loss arose from the act or neglect of the Innkeeper, or his Servants. 4. That the Goods were brought into the Inn, and were the property of the Plaintiff; and were lost or stolen from the Inn, after being so lodged there. In settling the Evidence, therefore, all these matters

(z) Buckman *v.* Levi, 3 Campb. 414.
(*a*) 2 Esp. Dig. N. P. 133.
(*b*) Bird *v.* Bird, 1 And. 29. Bennett *v.* Mellor, 5 T. Rep. 273.
(*c*) Thompson *v.* Lacy, 3 Barn. and Ald. 283.

must be proved by Witnesses, to be called on the Trial.

In answer to that case, however, the Innkeeper may prove,—1. That he told the Plaintiff that his House was full, and that there was no accommodation for him: but the Plaintiff said that "he would shift, or take his chance;" for if his Goods were afterwards lost, the Innkeeper would be discharged, for he did not *receive* the Plaintiff as a guest. (*d*) 2. He may shew that the Plaintiff was not a traveller or guest, but a neighbour, who asked for a lodging out of kindness. (*e*) 3. That the Goods were stolen by the Plaintiff's own Servant or Companion. (*f*) 4. That he desired the Plaintiff to put the Goods into a particular place for security, which he did not do, and they were lost, as the Innkeeper in that case is not liable. 5. That the Plaintiff gave orders to have the Goods disposed of in a particular place out of the Inn; as if he ordered his Horse to be turned out to grass, and he is lost, the Innkeeper is not liable. (*g*) 6. If the property lost was *goods*, the Innkeeper may shew, that they were Goods which the Plaintiff left at his Inn, where he himself was not as a guest, and of course the Innkeeper deriving no profit from them was not bound to take charge of them: (*h*) but if he had left a *Horse* there, inasmuch as the Innkeeper derived a profit from his standing, if he were lost, the

(*d*) Caley's case, 8 Co. 22. Bennett *v.* Mellor, 5 T. Rep. 273.
(*e*) Bird *v.* Bird, 1 And. 29. Moor. 78.
(*f*) Brand *v.* Glass, Moor. 158. Caley's Case, 8 Co. 32.
(*g*) Caley's Case, 8 Co. 32.
(*h*) Gelley *v.* Clark, Cro. Jac. 188.

Innkeeper would be liable: (*i*) all these facts must be proved by Witnesses, according as the Defendant relies on them for his defence. (*k*)

Another ground of Action against an Innkeeper, is *for refusing to receive a Person as a Guest,* who comes to his Inn, and offers to pay for what he has. The Plaintiff, in that case, must give in Evidence at the Trial, that the Defendant's House is a common and open Inn or Public House, and that he required to be entertained in it, which was refused; and that he offered to pay for what might be furnished to him: (*l*) but the Defendant may shew that his House was full, and that there was no room.

8. *Maliciously suing out a Commission of Bankruptcy* is another good ground of this Action. (*m*)

In that Action the Plaintiff must give in Evidence, 1. The Commission, and that the Defendant was the Petitioning Creditor; (*n*) this is done by the production of the Commission, and of the Affidavit required by the Statute on suing out, and is had by subpœnaing a Witness from the Bankrupt's Office, who will prove the issuing of the Commission on the Defendant's petition, and will produce the Affidavit; it will be necessary to prove the Defendant's handwriting to it. The subpœna should be with a *duces tecum* to the

(*i*) York *v.* Grindstone, Salk. 388.
(*k*) Salk. 388.
(*l*) Keilw. 50. Anon. Dyer 158.
(*m*) 2 Esp. Dig. N. P. 135.
(*n*) Brown *v.* Chapman, 3 Burr. 1418.

Solicitor under the Commission, and to the Assignees. If not forthcoming; the Gazette should be produced to shew the opening of the Commission; and any of the Commissioners may be called to prove that it was opened, and how it was proceeded in. 3. The Plaintiff must prove that it was superseded, and give Evidence of bad or malicious motives actuating the Defendant in suing it out. That it was superseded is proved, by producing the writ of supersedeas under the Great Seal: a copy of the Lord Chancellor's order on the Petition is not sufficient.(*o*)

So if the Plaintiff can bring malice home to the Defendant, by sufficient Evidence, he may apply for an assignment of the Bond from the Chancellor, as in this Action, the Damages are uncertain, but under the Bond he recovers the whole penalty; in which case the execution of the Bond and the Assignment must be proved.

9. *Deceit in Sales* forms another ground of this Action. (*p*)

When Goods have been sold under a warranty, if they turn out to be different from what they were warranted to be, the Action is brought on the warranty. If there was none, but fraud was practised, the remedy is by this Action.

To enable the Plaintiff to recover in this Action,

(*o*) Poynton *v.* Forster, 3 Campb. 60.
(*p*) 2 Esp. Dig. N. P. 136.

where there has been no Warranty, he must shew, 1. A sale, and a false representation made by the Defendant of the quality or value of the thing sold, which he knew at the time was untrue, and which the Plaintiff could not know. (*q*) 2. That it was made at the time of the sale, and not afterwards. (*r*) 3. The Plaintiff may shew, that the Defendant used some art to hide the defects of the things sold. (*s*) And, lastly, That the thing sold was bad and of no value, and not such as it was represented to be. What were the representations made by the Defendant, and the time when made, may all be proved by Witnesses, who can speak to those facts. And the Plaintiff must then prove that what the Defendant had delivered to him was not such as it was represented, was a thing of no value, and that fraud by that means had been practised on him, which is the foundation of this Action. The Defendant, therefore, by negativing that by Evidence, gives an answer to the Action. As he may shew, that the defect of which the Plaintiff complains by his Action, was perfectly visible, and no art used to disguise it: (*t*) that he himself was ignorant of its value, it being a thing of taste, and depending upon that for its value; (*u*) or that there was no representation made at the time of the sale, but long after. So he may give in Evidence, that the Plaintiff before the sale, might have informed himself of the truth of

(*q*) Risney *v.* Selby, 1 Salk. 211. Anon. 1 Stra. 414.

(*r*) Finch's Law, 289.

(*s*) 1 Roll. Rep. 5.

(*t*) 1 Roll. Ab. 5.

(*u*) Chandelor *v.* Lopus, Cro. Jac. 4.

what he stated, or represented. (*x*) As if he was to say in proof of the value of a thing "that J. S. would give so much," as by inquiring of J. S., he could have ascertained the fact, he had no ground to complain.

If the Defendant had sold something not his own, pretending to have a right or title to it, which he had not; the sale should be proved, and the property be proved to be in another, who may be called. (*y*) If there was a warranty, that should be proved as laid, and be proved by Witnesses to be false. Vid. *ante*, in Assumpsit. (*z*)

If the Plaintiff sues on the Warranty, the Defendant may give in Evidence, that no Warranty was given at the time of sale, which is necessary; that the defect complained of, was visible to the eye when the thing was sold. (*a*) That no art was used to disguise it, this may be proved by the Defendant's servant, who had the care of it: if the Goods were sold by sample, that the bulk corresponded. (*b*) The matters of defence are nearly the same as before stated. The Plaintiff must give Evidence of some deceit or fraud practised on him; and the Defendant must either give Evidence denying it to have taken place, or explain or account for it on grounds which will not bear that imputation.

(*x*) Vernon *v.* Keys, 12 East. 632. Lysney *v.* Selby, 2 Ld. Raym. 1118.

(*y*) 2 Esp. Dig. N. P.

(*z*) Williamson *v.* Allison, 2 East. 446.

(*a*) Finch's Law, 289.

(*b*) Parkinson *v.* Lee, 2 East. 314.

10. The case of *giving a Person a false Character* for solvency, by which he gains credit, for Goods, ranks under this head. The Plaintiff in that case must prove, first, what is stated in the Declaration, as to the representing the Party's character for solvency: this is usually laid in general terms. The representation made by the Defendant may have been either by writing, as by letter, which should be produced, and the Defendant's signature to it be proved; or by parol, to be proved by a Witness. The Plaintiff must next prove the furnishing of the Goods in consequence; and the loss of them, the Person recommended being insolvent; and he must, lastly, clearly make out in Evidence, that the Defendant knew at the time he made the representation, that the Person was not to be trusted; or did it *ex malâ fide,* that is, *ex. gr.* knowing that the Person recommended had some time before been a Bankrupt: that he was indebted to him, and he sought to pay himself by the produce of the Goods: or was himself to be in any way a gainer. (*c*) This is indispensable; for, if the Defendant himself believed the Person to be solvent, no action will lie. (*d*)

And to prove the Insolvency of the Party recommended to credit, and that the Defendant knew of it at the time, the Party himself may be called. (*e*)

The only answer which the Defendant can have is, that the representation he made was true; that he be-

(*c*) 2 Esp. Dig. N. P. 139. Hamar *v.* Alexander, 2 Bos., and Pull. 241.

(*d*) Haycraft *v.* Creasy, 2 East's Rep. 92.

(*e*) Brant *v.* Robinson, Ryan and M. 48.

lieved it himself, and gave it *bonâ fide;* or that the Plaintiff had ample means of informing himself as to the truth of what he said. (*f*)

11. For any *nuisance* committed by one man against another, either to his House or Land, this Action also lies.

Such as *darkening the lights* of his House, by raising some erection near it, overhanging it: affecting the comfort of the Party's house by noisome smells or noises, and the like. If the Action is for obstructing his light by raising some erection to obstruct it, the Plaintiff must first prove that his House had been erected at least twenty years; and that it had enjoyed the light, of the privation of which he complains, for that time: but it is not necessary to prove that, or any other length of enjoyment, where the obstruction is by one claiming under the same title with the possessor of the House, whose lights have been obstructed. As where the owner of an House and Shop in London divided it into two, and let one half to a Tenant who obstructed the other lights: and in another case, where two Houses were built nearly at the same time, and belonged to the same Proprietor, who sold one to the Plaintiff, and the Defendant being in possession of the other, obstructed his lights by adding to his own building: in both cases Actions were held well to lie; though the Plaintiff had not been twenty years in possession. But in such cases the Plaintiff must give in Evidence the unity of title;

(*f*) Pickering *v.* Dowson, 4 Taunt. 779.

and shew that the House obstructed in its lights, and that which caused it, belonged, or had belonged, to the same Person. (*g*)

The Defendant in answer to this case, where the Plaintiff claims to have a right to have the light not obstructed, and shews that his windows have been used for twenty years, may give in Evidence, that the land on which the erection complained of was his, *but was let to a Tenant* who occupied it for the whole time; that he knew nothing about the circumstances, so that the permission to the Defendant, to keep his windows so open, was the act of the Tenant, not of himself. (*h*) And in all cases that the Defendant had made the Erection, and that the effect of it, was to make the Plaintiff's House dark and uncomfortable, must be proved by Witnesses, who know the Plaintiff's House, the time it has stood, or the respective titles of the Parties, and who can speak to the effect of the Defendant's erection. (*i*)

The same mode of proof takes place, when the nuisance is for overhanging the Plaintiff's House: disturbing it with noises: or filling it with noisome smells: in those cases, the Plaintiff need only prove his possession, and call the Persons, living in the House, or others who have perceived the nuisance, to state the inconvenience caused. Nuisances to the

(*g*) Riviere *v.* Bower, Ryan and M., N. P. C. 24. Compton *v.* Richard, 1 Price 27.

(*h*) Daniel *v.* North, 11 East. 372.

(*i*) 2 Esp. Dig. N. P. 143. Aldred's case, 9 Co. 58. 2 Saund. 175. *in not.*

land are proved in like manner (*k*) by calling Witnesses to the facts.

In settling the Evidence under this head, it must be observed, that the Evidence should prove the fact to have taken place in *the County where the venue is laid,* as the Action is local. (*l*)

12. *Disturbance* in the enjoyment of any right is also a ground of this Action; as a *right of way, right of common, right of water,* and other similar rights. (*m*)

If the Action is for disturbance of a *right of Way:* the Plaintiff must first give Evidence of his right to the way, as it is over the soil of another. If he claims it by grant, he must produce the deed which gave it, and call the subscribing Witness to the Execution of it, unless it happens to be more than thirty years old, in which case the bare production of it is sufficient. So if the deed has been lost through time or accident, as he may plead that to dispense with a *Profert,* so he may give it in Evidence, by proving, that there was a deed to that effect: that it had been carefully searched for, but could not be found: or he may prove that it was burned or destroyed. This of course must be done by witnesses. (*n*)

(*k*) 2 Esp. Dig. N. P. 145.

(*l*) Warren *v.* Webb, 1 Taunt. 379.

(*m*) 2 Esp. Dig. N. P. 147. Co. Litt. 5. Clark *v.* Cogg, Cro. Jac. 170. Buckley *v.* Cole, 5 Taunt. 311.

(*n*) Read *v.* Brookman, 3 T. Rep. 151.

But if a Party has such a right of private way, it does not justify him going *out of the wqy*, though it is out of repair. If, therefore, the Defendant prove a right of way over the close of the Plaintiff, the latter may shew in answer, that the Defendant did not confine himself to the way, but went out of it on his soil, which makes him a Trespasser: but to do this, the Plaintiff must prove by Witnesses the very definite way to which the Defendant was entitled. (*o*) So the Plaintiff must also prove, that he used the way; and in one case it is said that twenty years' enjoyment uninterruptedly, is a title to go to the jury. (*p*)

If the right of way is claimed by *prescription or usage.*

That is supported by Evidence of Persons of considerable age who have known the way used without interruption as long as they can remember; this presupposes some grant of it, but which has been lost. (*q*)

If the right of way claimed, is a way *of necessity*, the Plaintiff must shew by a map, or by *vivâ voce* Evidence, the situation of his Close to which he claims the right of way; and then prove by Witnesses that there is no other way to get to it, than that which he claims over the soil of another; and that will establish his right: but the Defendant may shew that there was another way which the Plaintiff might use. And though

(*o*) Bullard *v.* Harrison, 4 M. and S. 387.

(*p*) Campbell *v.* Wilson, 3 East. 294.

(*q*) Daniel *v.* North, 11 East. 375. *in not.* Bull. N. P. 74.

the way claimed, at first might have been a way of necessity; yet if, by change of circumstances, the Plaintiff could have another way, as, *e. g.*, by purchasing land adjoining to his own Close, so that he could have a way over it to and from his Close; the way of necessity is at an end; that, therefore, is matter of Evidence for the Defendant. (*r*)

In settling the Evidence under this head, as well as in all cases of disturbance of right, great accuracy is required, to see that the proofs correspond with the right laid in the declaration, as any variance will be fatal; as if the Plaintiff was to lay his right of way from A. to B., and the *termini* were wrong, it being from A. to C., it would nonsuit the Plaintiff; (*s*) and so in other cases. As if he was to claim a right of carriage way, and he proved a drove way only, he would fail. (*t*)

The Evidence in case of a disturbance of *right of common* is founded on similar rules; that is, the Plaintiff must prove his right precisely as he lays it. —If it is laid to be for one species of cattle, and that of another is proved; for a given number, and a different one is proved; it is fatal. *Vide ante*, 305. The Plaintiff's Evidence in this Action is first to shew, that he had a right of common: that is proved by calling old Witnesses, who know the Plaintiff's land and the common, and that, as long as they can remember, the occupiers or owners of the Plaintiff's land

(*r*) Holmes *v.* Goring, 2 Bingh. 76.
(*s*) Wright *v.* Rattray, 1 East. 377.
(*t*) Ballard *v.* Dyson, 1 Taunt. 279.

have had and used the common; and they must also prove in what way it was used, which must be correspondent with the Pleadings. He must then prove by Witnesses, the injury done by the Defendant, or his cattle, by which his right of common was injured, which finishes his case. (*u*) But before the Evidence of such old Persons is admitted, the Party should shew an exercise of such right as he claims, or acts of enjoyment of it within living memory: this is done by Witnesses living on the spot; for it is the exercise of that right, which lets in the Evidence of reputation. (*x*)

It is to be taken as a general Rule, that similar Evidence is necessary to support every right claimed by prescription, as for *Toll for Fairs or Markets; Toll for grinding at a Mill.*

In the case of Fairs and Markets, the owner of the elder one only can maintain the Action; and when so entitled, it will be sufficient Evidence for him to shew, that the latter one was set up within seven miles of his. (*y*) So if it was held on the same day, it would be *primâ facie* Evidence of a disturbance. (*z*) But if the Defendant can shew that he enjoyed *the right* for twenty years, no Action will lie against him. (*a*) This Action, where the Plaintiff has a prescriptive right, lies against the Tenants of the manor or district only, who are by custom bound to grind their corn at a particular Mill, for the Toll, and is supported

(*u*) 2 Esp. Dig. N. P. 148. R. Mary's case, 9 Co. 112,

(*x*) 1 Maul. and S. 679. Weeks *v.* Sparke, 14 East. 330. *in not.*

(*y*) Bracton, lib. 2. c. 241.

(*z*) Yard *v.* Ford, 2 Saund. 171. 1 Lev. 296. S. C.

(*a*) Holcroft *v.* Heel, 1 Bos. and Pull. 400.

by proof of ancient usage and custom, and of the corn being carried elsewhere. (*b*) So a right to passage-money over an ancient *Ferry;* in which case the Plaintiff must prove a direct injury done to his Ferry, not collaterally, as by ferrying persons coming by another way; (*c*) *and the right to a watercourse,* are proved in the same way, by old Witnesses, who remember the toll or ferryage paid, or the watercourse flowing in a particular direction, as long as they can remember; in every respect, as *ante* 306: and in all cases, as the Action is for withholding the Plaintiff's right, he must prove the several acts of the Defendant in breach of it; (*d*) such as exposing Goods near the Market, and so fraudulently evading payment of the Toll; setting up another Fair or Market within seven miles of the Plaintiff's, or on the same day; carrying Corn to another Mill. (*e*) In the case of a *Watercourse,* so claimed by prescription, it is established by the Evidence similar to that just stated, and giving Evidence of the Defendant having diverted or turned the water; made Pits to take off part or the like, or in any way to diminish the quantity of water which usually flowed to the Plaintiff's Premises; which is all matter of proof by witnesses.

And in all these cases, if the question has ever been tried at law, and a verdict found as to the right, although the Trial has been between other Parties, the verdict is admissible Evidence. (*f*)

(*b*) Coryton *v.* Lithebye, 2 Saund. 114. Cort *v.* Birkbeck, Doug. 208.

(*c*) Tripp *v.* Frank, 4 T. Rep. 666.

(*d*) 2 Esp. Dig. N. P. 150. The Bailiff of Tewksbury *v.* Bricknell, 2 Taunt. 120. Holcroft *v.* Heel, 1 Bos. and Pull. 400.

(*e*) 2 Saund. 115. Lee *v.* White, Dougl. 243.

(*f*) *Vid. ante,* 306. Phil. on Evid. 310.

Disturbance in the enjoyment of *a Pew in a Church* is another ground of this Action. (g)

The Plaintiff must make out his title to the Pew in the first place: for this purpose, he must either produce a *Faculty*, which is a grant of the Pew under the seal of the Bishop, and is by its production sufficient Evidence; or he must shew his right to the Pew as appurtenant to an ancient messuage. For this purpose, old people should be called who know the Plaintiff's house; that it has been a dwelling-house of the family as long as they can remember; and that Individuals of that family always sat in that Pew to the exclusion of all others. (*h*) And it has been held, that such an enjoyment for thirty years would be sufficient. (*i*) And also that a faculty from the Ordinary may be presumed after a long uninterrupted use of the Pew claimed as appurtenant to a messuage. (*k*)

The Plaintiff should also prove, that he or his predecessors had repaired the Pew, if averred in the Declaration: but it is said not to be necessary in an Action against a Stranger; though, if against the Ordinary, it is necessary. (*l*)

All this is matter of parol Evidence, which the

(*g*) 2 Esp. Dig. N. P. 151.
(*h*) Stocks *v.* Booth, 1 T. Rep. 428.
(*i*) Griffith *v.* Matthews, 5 T. Rep. 296.
(*k*) Rogers *v.* Brooks, 1 T. Rep. 431 *in not.* Griffith *v.* Matthews, 5 T. Rep. 296.
(*l*) Kenrick *v.* Taylor, 1 Wils. 326. Mainwaring *v.* Giles, 5 Barn. and Ald. 356.

Plaintiff must bring forward at the Trial, as well as proof of the acts of disturbance done by the Defendant.

13. The infringement of an *Author's Copyright* forms another ground of this Action. (*m*)

In this case, the only Evidence required for the Plaintiff, is the proof that he is the Author of the Book or Work in question; which may be done by producing it, and calling a witness who knows it, or by the Printer who received the copy from him, and prove that it was published. He should then produce the Work or Book published by the Defendant, and prove that he published it, which may be done by a witness who bought it at the Defendant's house or shop; and then, by comparing one Book with another, the Piracy will appear. Thirdly, he should prove the Injury from the sale of the Defendant's Book.

The Evidence for the *Defendant* must, however, be attended to. He may shew,—1. That the Book published by him is essentially different from the Plaintiff's, though the subject is the same, by pointing out the additions or amendments made by him: this is done by collating the two Books, and pointing out the passages; that reduces the matter to a question for the Jury to say, whether the Books are the same, or different.—2. He may shew that the time given by the Statute of Copyright to the Author is expired. That may be proved either by the Persons who printed the first edition of the Plaintiff's Work,

(*m*) 2 Esp. Dig. N. P. 141.

or by others who know when it first came out, or the title page: the time of the printing of the Defendant's Work or Book will also appear by the title page. (*n*)

14. Of a similar description is this Action, when brought for *infringing a Patent.*

The Plaintiff, in this Action, must first produce the Patent, which, being under the great Seal, proves itself. The invention, whether mechanical or for a manufacture of any thing for which the Patent is granted, should be produced in a perfect state, and be proved to have been made according to the specification. Then that which has been made or manufactured by the Defendant of the same kind, must be produced, and be proved to have been purchased from, or obtained from the Defendant. It should then be pointed out to the Jury, by the Plaintiff's witnesses, that the two things produced are precisely alike; and in what respect, in particular, the Defendant has adopted that, for which the Plaintiff had the Patent. This is proved by witnesses, as well as the damages usually laid in the Declaration in the loss of the sale of the article by the Plaintiff. (*o*)

The description of the subject matter of the Patent should be plainly expressive of its object; and such

(*n*) Beckford *v.* Hood, 7 T. Rep. 620. Cary *v.* Longman, 1 East. 358. Roworth *v.* Wilks, 1 Campb. 94. Cary *v.* Kearsley, 4 Esp. N. P. C. 168. Vid. *plenius*, Esp. on Statutes Chap. II. on Infringement of Copyright.

(*o*) 2 Esp. Dig. N. P. 156.

objection may be taken at the opening of the Plaintiff's case.. If it is too general, the Patent is bad; as where it was "for an Improved Method of Lighting Cities, Towns, &c." and it was only an improvement on the old street lamp, the description was held to be too general, and the Patent void. (*p*) No Evidence is therefore required in such case.

This is all that is required for the Plaintiff to prove at the Trial. The Defendant's Evidence is more extensive.

He may first shew that the Invention for which the Plaintiff has obtained the Patent is not original. (*q*) This is done by producing something of the same sort for which the Patent is granted; and proving by Witnesses, that they had either made, or manufactured, or knew of their being made, or purchased the same, before the date of the Patent, from other Persons. By this Evidence it must be accurately established, that the subject of the Patent and that which has been made by the Defendant, are the same; but the Plaintiff may point out the difference, if there is really any.

The Defendant, 2dly, may shew any defect in the Patent or Specification; and if he does so, the Plaintiff cannot recover: as, he may shew that the Patent was for a whole work, whereas what the Plaintiff has done was an *addition only*, and for which only he should have had a Patent. And if the Patent is

(*p*) Lord Cochrane *v.* Smethurst, 1 Stark. 205.

(*q*) Edgeberry *v.* Stevens, 2 Salk. 447.

for several improvements, and there is no novelty in one of them, the whole Patent is void. (*s*) This, and all other objections to the Patent of the same description, that is, that the invention for which the Patent is granted is not new in all its parts, is proved by Witnesses who were acquainted with it before. And if the Inventor had publicly sold it before he got the Patent; the Defendant, giving Evidence of that fact, will defeat the Plaintiff. (*t*) That the specification was so obscure or inaccurate, that that for which the Patent was granted could not be made by it; or required something else to be used, not mentioned in the Patent, in order to produce it; (*u*) even though that was an ingredient for expediting the process. (*x*) All these render the Patent void, when proved.

3dly, The Defendant may shew that the Plaintiff was *not the Inventor*, but that another Person was: but it should appear, in that case, that such Person lived in England; for a Patent may be good, though granted for something previously made beyond sea, (*y*) but which had been brought into this country by the Plaintiff.

4thly, The Defendant may shew that the Plaintiff has not made his specification in the plainest and most intelligible terms, by which the public may be-

(*s*) Brunton *v.* Hawkes, 4 Barn. and Ald. 541.
(*t*) Wood *v.* Zimmer, Holt N. P. C. 58.
(*u*) Turner *v.* Winter, 1 T. R. 602.
(*x*) Wood *v.* Zimmer, Holt N. P. C. 58.
(*y*) Edgeberry *v.* Stephens, Salk. 447.

come acquainted with the mode of doing that for which the Patent has been granted: but has used terms calculated to mislead, or not to inform.

As where the Patent was for making Seidlitz Powders; and the component parts were Rochelle Salts, Carbonate of Soda, and Tartaric Acid, all of which were preparations to be had in the chymists' shops; and the specification of the Patent did not specify them by their names, but by the component parts at large of these different preparations: the Patent was ruled to be void, the Defendant giving in Evidence that what was set out at large was termed as above mentioned in all chymists' shops. (*z*)

5thly, The Defendant may shew that the Patent is for that which is not wholly new, or claims something different from the specification. But where the objection appears on the comparing the specification with the Patent, it is only necessary to give the specification in Evidence. (*a*)

Lastly, The Defendant may shew that the specification was not inrolled within the time required:(*b*) all these are cases of *vivâ voce* proof referring to the Patent and specification.

14. If the Action is for disturbing a Person in the enjoyment of *an office* with *fees* annexed. (*c*)

(*z*) Savory *v.* Price, Ryan and Moody, N. P. C. 1.

(*a*) Campion *v.* Benyon, 3 Brod. and Bingh. 5.

(*b*) Watson *v.* Pears, 2 Campb. 294.

(*c*) 2 Esp. Dig. N. P. 152.

The Plaintiff must first shew that he was appointed to the Office by the Person in whom the right of nomination was: he must next shew that there are certain legal and regular Fees belonging to it, and that the office is of a permanent nature. (*d*) If the fees claimed are what are merely given as gratuities, that will not support an action. He must, lastly, prove the amount of them, and the taking of them by the Defendant to his injury for a certain time. The appointment to the office may be by parol or grant: if the former, it must be proved by a Witness; if the latter, by production of the Deed. The other matters are proved by Witnesses.

15. An Action on the case will lie against a Returning Officer for refusing to *receive a Person's Vote* for a Member of Parliament, he being entitled to vote: but it must be proved by the Plaintiff that it was done *maliciously*, malice being the chief ingredient in this Action. (*e*)

In settling the Evidence on this head, the Plaintiff must make out a clear right of voting: and prove that he tendered his Vote for a particular Candidate, which the Defendant refused to receive; and thus to give Evidence of the corrupt or malicious motive which induced him to do so.

These are the most important heads of this Action, as they apply to the things for an injury to which the

(*d*) Earl of Montague *v.* Lord Preston, 2 Vent. 171. Harvey *v.* Newlyn, Cro. El. 859.

(*e*) Cullen *v.* Morris, 2 Stark. 577.

Action is brought: it remains only to consider such as have a reference to the *Person.*

These are: as the Plaintiff stands in the relation of a Father, a Husband, or a Master.

1. This Action lies at the suit of the *Father* for *Seduction* of his daughter. It is in form considered as maintainable for the mere loss of the service of his daughter; but it has been ruled, that the Plaintiff may go into Evidence of the loss of comfort in the affections of his child, and the injury to his feelings. (*f*)

This case is usually proved by the Plaintiff's daughter who has been seduced; proving her relationship to the Plaintiff: her doing the household offices and duties for him: her Seduction, with the circumstances of the misconduct and dishonour of Defendant, such as seducing her by a promise of marriage: and if the Plaintiff has been put to the expense of her lying in, or otherwise, and it is laid in the Declaration, it should be proved.

It is indispensable for the Plaintiff to prove that, at the time the seduction took place, his daughter made part of his family, or occasionally at least assisted in the domestic business of it: (*g*) for if she was out at service, or had otherwise separated her-

(*f*) 2 Esp. Dig. N. P. 153. Bedford *v.* M'Kowl, 3 Esp. N. P. C. 119.

(*g*) Dean *v.* Peel, 5 East. 45.

self entirely from her Father's family, no Action in that case will lie at his suit. (*h*)

And the Plaintiff may give in Evidence that the Defendant visited and was received at his house under the idea of his paying honourable addresses to her. (*i*) This may be proved by the party seduced herself.

This Action will lie for the excessive beating or ill treating the Plaintiff's son or daughter, with a *per quod servitium amisit.* (*k*) The facts are proved in the same way as in the case of Seduction.

2. This Action, in which the Plaintiff sues in the character of *an Husband,* (*l*) with respect to Adultery, has been treated of before. The Actions here to be mentioned are, first, where the Wife has been induced to live *away from her Husband,* by the persuasion of the Defendant, who has harboured her after notice; and, after a request that she would return, has continued to entertain her.

In this Action, the Plaintiff must prove his marriage in the way beforementioned: then, that he and his Wife lived happily together, and that he treated her properly, so that there was no pretence for her quitting his house on account of ill treatment.

(*h*) Postlethwaite *v.* Parkes, 3 Burr. 1878.
(*i*) Elliott *v.* Nicklin, 5 Price 641.
(*k*) Jones *v.* Brown, 1 Esp. N. P. C. 217.
(*l*) 2 Esp. Dig. N. P. 152.

He must then shew, that she was living at the Defendant's house, and that he had given notice to him of her improper departure, and required him not to harbour her: this notice, it is advisable, to give in writing before bringing the Action, and to prove a copy of it at the Trial. The Plaintiff may then give in Evidence, the degree of comfort which he antecedently enjoyed with his Wife; and the necessity for her attention to his domestic concerns and to his children, if he has any. (*m*)

These matters are proved by Persons well acquainted with the family.

An action on the case also lies at the suit of the Husband for *a battery of, or injury done to his Wife*, by means whereof she is prevented from attending to her domestic concerns: in this case, her marriage should be regularly proved; the injury which she received from the Defendant be proved by a witness, and the inconvenience and discomfort sustained by the Plaintiff from her confinement and illness; and if he has been put to any expense for medical assistance, or in procuring a person to attend to his Family, he may give that in Evidence, if laid in the Declaration.

3. In the character of a *Master*, the Plaintiff may also sustain this Action, for *seducing away and harbouring his Servant or Apprentice;* or for retaining

(*m*) Winsmore *v.* Greenbank, Bull. N. P. 78.

the former in his service, when required to discharge him: or for harbouring his Apprentice. (*n*)

In such Action, the Plaintiff must prove that the Person was his Servant, and known to be so by the Defendant; (*o*) that the time of his service was not ended, nor had the Plaintiff discharged him: that the Defendant, with such knowledge, took him into his service. When this has been done, it is not absolutely necessary for the Plaintiff to require the Defendant to give him up, before Action brought: but it is advisable to do so.

But where the Defendant had hired a Servant of the Plaintiff's, not knowing him at the time to be so, no Action will lie until after notice given to him by the Plaintiff that he is so, and a requisition made by him that he should discharge such Servant from his employment. (*p*) This notice and requisition are best made in writing, and served on the Defendant before Action brought, and a copy of them proved to have been served on him by a witness at the Trial.

If the Plaintiff has suffered any loss by the absence of the Servant, as, *ex. gr.* if his work should have been delayed: this, if laid in the Declaration, the Plaintiff should prove by *vivâ voce* Evidence.

If the Action is for seducing or harbouring the Plaintiff's Apprentice, he must prove the Indenture

(*n*) 2 Esp. Dig. N. P. 154. Hambleton *v.* Veere, 2 Saund. 169.
(*o*) Anon. Winch 51. F. N. B. 390.
(*p*) Blake *v.* Lanyon, 6 T. Rep. 221.

of Apprenticeship by the subscribing witness, and then the same steps as to the notice, requisition, &c., as beforementioned in the case of a Servant; and, in either case, it is no excuse for the Defendant, that the Servant or Apprentice refused to return, or that the Servant was a Journeyman, (*q*) working by the Piece; the Defendant is bound to send them away.

The only matter, it should seem, which the Defendant can give in Evidence is, that the Servant was bound to serve his Master under a penalty, which the Master sued for, and enforced the payment of; for then the right of service is at an end. (*r*)

If a Person beat the Servant of another, so as to disable him from working for his Master, the Master on proving that he was his Servant, and the injury to have been done to him by the Defendant, and the loss he has sustained from the want of his service, may recover damages, to the amount of it, in this Action of Trespass on the Case. (*s*)

(*q*) 5 T. Rep. 221. Hart *v.* Aldridge, Cowp. 54.
(*r*) Bird *v.* Randall, 3 Burr. 1345. 1 Black. Rep. 387. S.C.
(*s*) 1 Roll. Ab. 88.

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